Supreme Court, U. S.
FILED
APR 14 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 74-1287

ROBERT WEINSTEIN, et al.,

Petitioners

v.

HOWARD E. BRADFORD, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, Robert Weinstein, John H. Baker, Jr., and Wiley Earp, members and former members of the North Carolina Parole Commission, together with Ben L. Baker, Supervisor of Combined Records for the Division of Prisons of the North Carolina Department of Correction, and V. L. Bounds, former Commissioner of the North Carolina Department of Correction, pray that a writ of centiorari issue to review the judgment of the United States Court of Appeals filed November 22, 1974 in the case of BRADFORD v. WEINSTEIN.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit filed November 22, 1974 is not yet reported and is printed as Appendix A to this Petition (A pp 9-25). The

Order of the Fourth Circuit Court of Appeals filed January 15, 1975 denying the Petition for Rehearing *En Banc* is printed as Appendix B to this Petition (A pp 26-28).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS APPLICABLE TO THE PROCEDURES FOLLOWED BY A PAROLE COMMISSION IN CONSIDERING AN INMATE FOR PAROLE.

II.

WHETHER PREISER v. RODRIGUEZ, 411 U.S. 475 (1973) PRECLUDES AN ACTION UNDER 42 U.S.C. § 1983 CLAIMING THE APPLICABILITY OF DUE PROCESS IN PAROLE CONSIDERATION.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Howard E. Bradford and Robert E. Harris are North Carolina State Court prisoners who had been denied parole by the North Carolina Board of Paroles. With the assistance of a "penitentiary lawyer", they filed a civil rights complaint dated March 2, 1973 challenging disciplinary procedures of the North Carolina Department of Correction, the indeterminate sentence procedures of the North Carolina Department of Correction, and the parole granting and revoking procedures of the North Carolina Board of Paroles. On May 1, 1973, without requiring an answer from the Defendants, the District Court dismissed

the complaint. BRADFORD v. WEINSTEIN, 357 F. Supp. 1127 (E.D.N.C. 1973).

Plaintiffs appealed the dismissal to the United States Court of Appeals for the Fourth Circuit which, in a two to one decision, held that due process is required in parole consideration and that inmates may attack the denial of due process in a suit brought pursuant to 42 U.S.C. § 1983 (A pp 9-25). The Defendants moved for rehearing and rehearing *en banc*. The Court voted four to four on Defendants' Motion to Rehear and, therefore, the Motion was denied[1] (A pp 26-28).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN BRADFORD v. WEINSTEIN CONFLICTS WITH THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS IN MENECHINO v. OSWALD, 430 F. 2d 403 (2nd Cir. 1970), cert. denied, 400 U. S. 1023 (1971); THE DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS IN TARLTON v. CLARK, 441 F. 2d 384 (5th Cir. 1971), cert. denied, 403 U.S. 934 (1971) AND SCARPA v. UNITED STATES BOARD OF PAROLE, 477 F. 2d 278 (5th Cir. 1973), VACATED ON OTHER GROUNDS, 414 U.S. 809 (1973); AND THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN UNITED STATES BOARD OF PAROLE v. MERHIGE, 487 F. 2d 25 (4th Cir. 1973).

In reliance on what it conceived to be the holding of MORRISSEY v. BREWER, 408 U.S. 471 (1972), GAGNON v. SCARPELLI, 411 U.S. 778 (1973), and WOLFF v. McDONNELL, 418 U.S. 539 (1974), the Fourth Circuit Court of

1. It is interesting to note that in the Order denying Rehearing, all four judges who voted in favor of the rehearing noted their dissent on the merits from the panel's decision. Thus, by the luck of the draw, the opinion of the District Court was reversed rather than affirmed. See Order of the Fourth Circuit Court of Appeals denying the Petition for Rehearing *En Banc* printed as Appendix B to this Petition (A pp 26-28).

Appeals has determined that "the due process clause has application to parole eligibility proceedings." The Court went on to say that "We are not persuaded by those cases which have indicated a contrary conclusion. See, e.g., MENECHINO v. OSWALD, 430 F. 2d 403 (2 Cir. 1970), cert. den., 400 U.S. 1023 (1971); WALKER v. OSWALD, 449 F. 2d 481 (2 Cir. 1971); SCARPA v. U. S. BOARD OF PAROLE, 477 F. 2d 278 (5 Cir. 1973), vacated on other grounds, 414 U.S. 809 (1973); BUCHANAN v. CLARK, 446 F. 2d 1379 (5 Cir. 1971); BAINES (sic) v. U.S., 443 F. 2d 260; SCHAWARTZBERG v. U. S. BOARD OF PAROLE, 399 F. 2d 297 (10 Cir. 1968)."

To our knowledge, no other Court of Appeals has held that due process is applicable to parole consideration procedures. In fact, the cases noted by the Fourth Circuit, e.g., MENECHINO v. OSWALD, supra; WALKER v. OSWALD, supra; and SCARPA v. U. S. BOARD OF PAROLE, supra, indicate the opposite conclusion.

In MENECHINO, the Second Circuit analyzed the issue at length and concluded that the "essential conditions for requiring procedural due process as a matter of constitutional right are missing." 430 F. 2d at 407. That Court noted the identity of interest between the prisoner and the parole board, the lack of "a private interest enjoyed by [the prisoner], or to which he is entitled, of the type qualifying for due process protection", and the great burden which even minimum due process requirements would place on the State.[2] 430 F. 2d at 408. MENE-

2. As the District Court points out in the Order of Dismissal, BRADFORD v. WEINSTEIN, 357 F. Supp. 1127 at 1132:

> ". . . The administrative burden of the parole system would be enormously increased if each inmate were given a plenary hearing on the suitability of a parole. Further burdens would ensue with the requirements of notice, procedures for the appointment of counsel and reporters, subpoenaing and cross-examination of witnesses, compensation of counsel and cost of transcripts, and the preparation of findings and conclusions by the Board. Such requirements would likely result in congested dockets before the board of paroles and result in undue delay in reviewing the individual cases of 10,000 prisoners in the system as each becomes eligible for parole consideration. The State is not constitutionally required to provide for the parole of prisoners, and if the plaintiffs' demands were enforced, and the burden of the prison system became too great, the State might find it necessary or desirable to terminate the parole system."

CHINO was reaffirmed by the Second Circuit in WALKER v. OSWALD, supra.

In SCARPA the Fifth Circuit announced the same rule. "Due process rights do not attach" at parole consideration proceedings. "In the absence of evidence of flagrant, unwarranted or unauthorized action by the Board, it is not the function of the Courts to review such proceedings." 477 F. 2d at 283.

A long line of cases recognizes the unique discretion committed to the United States Board of Paroles under 18 U.S.C. § 4203[3], a statutory procedure similar in intent to N.C.G.S. 148-60.[4] Surprisingly, this position was affirmed by the Fourth Circuit Court of Appeals in U. S. BOARD OF PAROLE v. MERHIGE, 487 F. 2d 25 (4th Cir. 1973). In U. S. BOARD OF PAROLE, supra, the Fourth Circuit notes that "in adhering to its prior position, the Fifth Circuit was in accord with the clear weight of authority", citing BUCHANAN v. CLARK, 446 F. 2d 1379 (5th Cir. 1971), cert. denied, 404 U.S. 979 (1971); THOMPKINS v. U. S. BOARD OF PAROLE, 427 F. 2d 222 (5th Cir. 1970); BREST v. CICCONE, 371 F. 2d 981 (8th Cir. 1967); CAGLE v. HARRIS, 349 F. 2d 404 (8th Cir. 1965). "We also note that this Court [the Fourth Circuit] gave short shrift to a case of similar nature in BOZELL v. UNITED

3. 18 U.S.C. § 4203 reads in pertinent part:
"(a) If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board release is not incompatible with the welfare of society, the Board may in its discretion authorize release of such prisoner on parole."

4. N.C.G.S. 148-60 reads:
"The time of releasing each prisoner eligible for consideration for parole as provided herein shall be discretionary, and due consideration shall be given to the reasonable probability that the prisoner will live and remain in liberty without violating the law; that the release of the prisoner is not incompatible with the welfare of society and that the record of the prisoner during his confinement established that the prisoner is obedient to prison rules and regulations, and has shown the proper respect for prison officials, and due regard and consideration for his fellow prisoners; and that the prisoner harbors no resentment against society or the judge, prosecuting attorneys, or jury that convicted the prisoner."

STATES, 199 F. 2d 449 (4th Cir. 1952)." U. S. BOARD OF PAROLE v. MERHIGE, supra.

II.

THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN BRADFORD v. WEINSTEIN CONFLICTS WITH THE DECISION OF THIS COURT IN PREISER v. RODRIGUEZ, 411 U.S. 475 (1974).

In BRADFORD v. WEINSTEIN, the Fourth Circuit Court of Appeals determined that a suit which challenges the procedures of the North Carolina Parole Commission is cognizable under the provisions of 42 U.S.C. § 1983. This determination conflicts with the decision of this Court in PREISER v. RODRIGUEZ, 411 U.S. 475 (1974). In that case, this Honorable Court held that "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983." PREISER v. RODRIGUEZ, supra, at 490. PREISER goes on to note that "the strong considerations of comity . . . require giving the State the first opportunity to correct errors made in the internal administration of their prisons." Under the rule announced in PREISER, a suit of this type should have properly been brought under federal habeas corpus, and not as a civil rights suit. However, two judges of a three-judge panel of the Fourth Circuit Court of Appeals disagree and their decision has been upheld as the result of a four to four vote upon a Petition for Rehearing and Rehearing *En Banc*.

III.

THE DECISION BELOW RAISES SERIOUS PROBLEMS AFFECTING THE STRUCTURE OF CRIMINAL JUSTICE.

The Fourth Circuit Court of Appeals has held that due process applies in parole consideration procedures. The North Carolina Department of Correction currently has a daily in-

mate population of 12,000 and if the North Carolina Parole Commission is required to establish due process procedures in considering inmates for parole consideration, their workload and the corresponding expense to the State will be magnified manyfold.[5] And, certainly, there will be congested dockets with resultant delay in reviewing the individual cases of the 12,000 inmates as each becomes eligible for parole consideration.

North Carolina's present parole consideration procedures are fair and well balanced.[6] Procedures which would require greater due process in parole consideration would likely have no appreciable effect on the number or type of inmates paroled,

5. In 1972, 3,382 inmates in the custody of the North Carolina Department of Correction were paroled by the North Carolina Board of Paroles. During the next year, 1973, there were 20,355 cases reviewed by the Board of Paroles. Of these, 6,174 were investigated for release and 2,286 paroles and 530 conditional releases were granted. During 1973, the Board of Paroles had a daily average of 3,982 persons under parole supervision and their revocation rate for all parolees was 13.3 per cent.
In 1974, 21,458 cases were reviewed by the Parole Commission, 4,804 were investigated for release and 3,409 paroles, late paroles and conditional releases were granted.

6. Ninety days prior to the inmate's first parole eligibility date or on the next scheduled review date, the inmate's file is pulled and studied carefully by a case analyst. Based upon what the analyst finds in the file, the inmate will be recommended to the Commission for either parole denial or a preparole investigation.

If parole denial is recommended, the case comes before the Commission on what is known as the "case review" form which contains the reasons for the analyst's recommendation. The overwhelming majority of parole denials come under the "case review" because the files contain information that make it obvious that the inmate will not qualify for a parole at this point. For instance, the inmate may have a detainer against him and is awaiting trial on another charge. He may be on escape or a recently recaptured escapee; he may have several prison infractions that make him ineligible for parole or he may have a long prior criminal record and his current prison record is not such as to give the Commission reason to believe there is a reasonable probability he will live and remain in liberty without violating the law.

If, during the case review, the analyst or any one Commissioner (out of a total of five) feels the inmate's case merits further investigation, a preparole investigation is ordered. At this point, an interview with one Commissioner is scheduled. Each week one Commissioner conducts these interviews at various prison units about the State. If a Commissioner, following an interview, recommends against parole, the case is presented to the full Commission at this point and, if three Commissioners approve, the investigation is suspended, the inmate is denied parole, and a new review date is scheduled. If the Commission tentatively recommends parole, the investigation is continued and once this is completed, the case is presented to the Commission for a vote.

except, perhaps, to decrease that number because of the strain placed on the Parole Commission's resources.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals in the application of the MORRISSEY, GAGNON and WOLFF doctrines in this case extends well beyond this Honorable Court's intent. It is clear that this Court's holdings in MORRISSEY, GAGNON and WOLFF did not envision the conclusion reached in the case at bar. The application of extensive due process requirements to parole consideration procedures is not the situation to which the holdings in MORRISEY, GAGNON and WOLFF apply. Therefore, in view of the conflict of decisions between the Second and Fifth Circuits, the decisions of this Court in MORRISSEY, GAGNON and WOLFF, and the effect upon the administration of all parole programs, both State and Federal, it is respectfully submitted that this case is of sufficient importance that this Court exercise its jurisdiction and issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit. We believe that the questions submitted are truly substantial and present to this Court far reaching issues of the most vital public importance that must be answered.

Respectfully submitted,

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"Appendix A"
United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 73-1751

Howard E. Bradford, individually and on behalf of all others similarly situated,

Appellant,

v.

Robert Weinstein, John H. Baker, Jr., and Wiley Earp, individually and in their official capacities as members of the North Carolina Board of Paroles, Ben L. Baker, individually and in his official capacity as supervisor of combined records, V. L. Bounds, individually and in his official capacity as commissioner of correction of the State of North Carolina, their agents, employees, and successors in interest,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Algernon L. Butler, Chief District Judge.

No. 73-1921

Levi Jenkins, on behalf of himself and all others similarly situated,

Appellant,

v.

Walter D. Tyler, John E. Huss, H. L. Lackey, Charles R. Sanders, Jr., Marion Beasley, and Elizabeth M. Myers, Individually and as the

South Carolina Probation, Parole and Pardon Board,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Sol Blatt, Jr., District Judge.

Argued February 4, 1974 Decided November 22, 1974

Before BRYAN, Senior Circuit Judge, and WINTER and BUTZNER, Circuit Judges.

Professor Ralph S. Spritzer [Court-appointed counsel], and Howard Lesnick for Appellant in No. 73-1751 and 73-1921; Emmet H. Clair, Assistant Attorney General, (Daniel R. McLeod, Attorney General, Robert M. Ariail, Assistant Attorney General, on brief) for Appellees in No. 73-1921; Jacob L. Safron, Assistant Attorney General, (Robert Morgan, Attorney General of North Carolina, on brief) for Appellees in No. 73-1751.

WINTER, Circuit Judge:

These two appeals present two important questions: Does the due process clause of the fourteenth amendment have any application to the conduct of proceedings by a parole board in states which undertake to grant paroles to certain prisoners before service in full of the sentences imposed upon them? If so, may the prisoners complain of a denial of due process in a suit under 42 U.S.C. § 1983, where the sole basis of their complaint is the manner in which the proceedings were conducted and there is no claim that they are entitled to immediate or even earlier release? We think that both questions should be answered in the affirmative; but, for present purposes, we refrain from defining the effect of the application of the due process clause to the procedure for granting paroles.

No. 73-1751 is a class action in which the named plaintiffs, inmates of North Carolina correctional institutions, sued for

themselves and others similarly situated under 42 U.S.C. § 1983, alleging that they were eligible to be considered for parole, that it had been denied them but that the proceedings were constitutionally defective because they were afforded no hearing before the parole board, they had no notice of or opportunity to comment upon adverse information to be relied on in the process of decision, and they were never advised of the reasons for denial of parole or the evidence upon which denial was based. The district court denied class action status and it dismissed the individual claims, holding that the "Due Process Clause does not apply in procedures designed to determine suitability for parole." We reverse and remand for further proceedings.

In No. 73-1921, plaintiff, an inmate of a South Carolina prison, sued for himself and others similarly situated under 42 U.S.C. § 1983. He alleged that he had become eligible for parole under South Carolina law but that parole was denied him. The proceedings were constitutionally defective, according to him, because of (1) the character of the evidence on which the parole board relied, (2) its failure to grant him a "full" and impartial hearing with advance notice of adverse information, (3) its failure to establish in advance of judgment the criteria of judgment, and (4) its failure to state reasons for denial of parole. The district court dismissed the complaint for failure to exhaust available state remedies. It was of the view that Preiser v. Rodriguez, 411 U.S. 475 (1974), was applicable since plaintiffs' ultimate goal was release on parole, and therefore plaintiffs' exclusive remedy was to seek a writ of habeas corpus to which the exhaustion requirement of 28 U.S.C. § 2254 (b) applied. We again reverse and remand for further proceedings.

I.

It is important to note at the outset that in their pleadings, their briefs,[1] and in their oral argument, plaintiffs make no

1. A few brief references to their brief proves the point:

> No claim is made that the particular sentence being served has expired or that appellant [Jenkins, et al., adopted by Bradford] has a right to

claim that they are entitled to immediate release. Nor do they claim that they have a *right* to parole so that they would be released prior to the full service of their sentences less whatever credits the states of North Carolina and South Carolina may grant them. They also make no claim that they have the right to inquire into the internal functioning of the parole boards or the adjudicatory processes by which paroles are granted or denied. Cf. United States Board of Parole v. Merhige, 487 F.2d 25 (4 Cir. 1973). The sole thrust of their complaints is a constitutional attack upon the procedures of the respective parole boards. As characterized by their counsel, the substantive question is not the right to parole but the right to procedural due process in the consideration of parole.

Since North Carolina and South Carolina have both adopted legislation affording even the prisoner serving the longest term upon conviction of even the most heinous crime the right to be considered eligible for release, usually upon one or more conditions, prior to service of the entire term imposed on him,[2] we

> abbreviate it. The dispute goes only to the manner in which the State judges the prisoner's potential for successful parole; there is no claim that the review process must or should lead to a specific outcome for a particular prisoner . . . . While it is doubtless the desire of appellant and others similarly situated to terminate their confinement as soon as possible, the Court is not being asked to rule on the duration of their confinement . . . . If appellant prevails in his federal suit, the dates of his release will still depend upon the discretionary judgment of those State officials who pass on the issue of parole.

2. 3C G.S. N.C. § 148-58 (1974) provides that all prisoners shall be eligible to have their cases considered for parole after the service of (a) a fourth of their sentence if the sentence is determinate, (b) a fourth of their minimum sentence if the sentence is indeterminate, and (c) ten years of a life sentence. The statute provides that it "shall not be construed as making mandatory the release of any prisoner on parole, but *shall be construed as only guaranteeing to every prisoner a review and consideration of his case upon its merits.*" (Emphasis added.) The statutes are silent about if and when a prisoner, denied parole when he first becomes eligible, is entitled to a subsequent review of his case. Presumably the regulations adopted under the authority of § 148-57 cover this matter, but they have not been pleaded.

In South Carolina, 11 Code of Laws S.C. § 55-611 (1973 Cum Supp.), prescribes eligibility for parole after service of ten years for those sentenced to thirty years, more than thirty years, or life, and after service of the minimum indeterminate sentence for first offenders sentenced to an indeterminate term. The statute is silent about successive applications for parole, and it grants no general rule-making authority to the Probation, Parole and Pardon

have no difficulty in concluding that the due process clause has *some* application to the proceedings in which it is determined whether that option shall be granted him. This is so even though we fully recognize that no prisoner ever acquires a right to earlier release; at most he has a right only to be *considered* for earlier release and a *privilege*, which may be withheld, to be *granted* it.

As Board of Regents v. Roth, 408 U.S. 564, 569-70 (1970), teaches:

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite. (Footnote eliminated.)

Both *Roth* and its companion case, Perry v. Sindermann, 408 U.S. 593 (1970), were concerned with the discharge of teachers employed by state-owned-and-operated educational institutions. Both cases turned primarily on whether the teachers concerned had a "property" interest in their employment, although *Roth* contained instructive dicta about when a public-employed teacher's "liberty" might be limited, as, for example, where he was discharged for a reason which impugned his good name, reputation, honor or integrity. 408 U.S. 573-74. As a consequence, *Roth* and *Sindermann* did little to provide a definitive definition of "liberty" which we could easily apply and which would be dispositive of these appeals. *Roth* did say that "liberty" protected by due process extends "beyond the sort of formal constraints imposed by the criminal process" and that the term is "not confined to mere freedom from bodily

Board. Yet, it would seem obvious that a prisoner who is unable to satisfy the criteria for parole contained in § 55-612 when he first becomes eligible may satisfy them at a later date. Presumably a later, successive application may be entertained.

restraint" (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)). 408 U.S. at 572.

We are of the view that plaintiffs' right to consideration for parole eligibility is, at least, an aspect of liberty to which the protection of the due process clause extends. Indeed, in North Carolina, which guarantees to each prisoner with respect to parole "a review and consideration of his case upon its merits," the right may be one of "property." This conclusion stems from three of the latest cases to consider the myriad of situations in which the due process clause is applicable: Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973); and Wolff v. McDonnell, —U.S.— (1974). All were cases in which "liberty" was at stake. In *Morrissey*, the due process clause was held applicable to proceedings having the potential of revocation of parole; in *Gagnon*, the proceedings having the potential of revocation of probation; and in *Wolff*, to disciplinary proceedings within a correctional institution. It is true that in *Morrissey* and *Gagnon* the continued actual liberty of the subject of the proceeding was at stake, but in *Wolff*, what was at stake was discipline—usually more onerous conditions of servitude—of one already confined.

In the instant cases, there is no present liberty at stake. There is only the right to be considered for parole and the inchoate privilege of some earlier future release if the parole board, in its discretion, concludes to grant it. The case is really the converse of *Wolff*. There, one who was confined was subjected to the risk of durance more vile; here, one who is confined is afforded the *right* of consideration of partial release from restraint and the privilege of partial release. The first is a right not to be restrained; the second, the privilege of release from restraint. The distinction is without a difference, because the historical dichotomy of protection, depending upon whether something is a right or a privilege, has now been eradicated. Graham v. Richardson, 403 U.S. 365, 374 (1971); Morrissey v. Brewer, 408 U.S. at 481; Board of Regents v. Roth, 408 U.S. at 571. Instead, the test of "[w]hether any procedural protections are

due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring . . . ." We think it would be a grievous loss for a prisoner by reason of a completely ex parte proceeding, and the resulting increased opportunity for committing error, to be denied parole and required to serve more of his term because the attention of the parole board was not called to data tending to indicate that parole should be granted, or for a prisoner whose incarceration has as its ultimate objective the prisoner's rehabilitation to fail to know, let alone understand, why parole is denied him and hence what changes in attitudes, habits, and the like will be required if he is ever to be successful in obtaining parole, unless, of course, there is found to be some compelling state interest in why he should not be advised. In the case of the latter, absent proof to the contrary, we would presume prejudice also in the fact that a denial of parole carries with it an adverse innuendo probably making a successive application for parole more difficult to sustain. It follows that since procedural due process was required to be afforded in *Wolff*, it must be afforded here.[3]

In sum, we think that the due process clause has application to parole eligibility proceedings. Our views are in accord with those expressed in Childs v. U. S. Board of Parole, 371 F.S. 1246 (D. D.C. 1973). We are not persuaded by those cases which have indicated a contrary conclusion. See, e.g., Menechino v. Oswald, 430 F.2d 403 (2 Cir. 1970); cert. den., 400 U.S. 1023 (1971); Walker v. Oswald, 449 F.2d 481 (2 Cir. 1971); Scarpa v. U. S. Board of Parole, 477 F.2d 278 (5 Cir. 1973), vacated on other grounds, 414 U.S. 809 (1973); Buchanan v. Clark, 446 F.2d 1379 (5 Cir. 1971); Baines v. U. S., 445 F.2d 260;

3. Other authorities support our conclusion that present enjoyment of a protectable interest is not a prerequisite of due process. See Goldsmith v. Bd. of Tax Appeals, 270 U.S. 117 (1926) (right of C.P.A. to practice before the Board of Tax Appeals); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) and Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (admission to the bar); Speiser v. Randall, 357 U.S. 513 (1958) (right to a tax exemption).

Schawartzberg v. U. S. Board of Parole, 399 F.2d 297 (10 Cir. 1968). It should be noted that each, except *Scarpa*, was decided before *Morrissey*, *Gagnon* and *Wolff*, from which we take our cue. In *Scarpa*, what was the correct reading of *Morrissey* was identified in the main opinions of the in banc court as one of the principal points over which the division occurred. We think that in the light of *Gagnon* and *Wolff*, *Morrissey* should receive the reading placed on it by Judges Tuttle, Wisdom and Goldberg, in dissent, in *Scarpa*.

Of course, to conclude that the due process clause has application to parole eligibility proceedings is only the beginning of the inquiry, because immediately and inevitably the next question is how much process is "due." On this, we express no view. In these records, plaintiffs' allegations have not been proved. More importantly, defendants' practices and procedures with respect to parole eligibility proceedings have not been shown. Nor have defendants' interests in preserving the practices and procedures currently followed been developed. All of these must be known because "due process" is a flexible concept and the due process clause, where it is applicable, does not carry with it a fixed panoply of rights or a fixed mode of procedure. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); *Morrissey*, 408 U.S. at 471; *Wolff*, —U.S. at —. This is so because the due process clause only requires a "balance" between what may be conflicting interests to arrive at what is substantially fair and just. *Wolff*, —U.S. at —. Hence, we leave to the district courts in the first instance the determination of what the due process clause requires in the instant cases after the district courts have conducted the requisite full evidentiary exploration.

II.

We turn to the question of whether plaintiffs can litigate the

effect of the application of the due process clause to the procedure for granting paroles in a suit under 42 U.S.C. § 1983. The argument that they cannot is erected on Preiser v. Rodriguez, supra, and so we begin by a consideration of that case.

In *Preiser*, the Supreme Court held that 28 U.S.C. § 2254 (b), which requires an applicant for federal habeas first to exhaust "the remedies available in the courts of the State," superseded the unqualified right to sue under 42 U.S.C. § 1983 to redress a state denial of a federal consitutional right where the substance of the suit is a challenge that is "just as close to the core of habeas corpus as an attack on the prisoner's conviction." The Court further explained that a suit is close to the "core of habeas corpus" if it challenges "directly the constitutionality of [the prisoner's] physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration." 411 U.S. at —. In *Preiser*, the prisoners had alleged that they had been deprived of good-time credits as a disciplinary measure in administrative proceedings that were conducted with a lack of procedural due process. The specific relief sought was restoration of such credits. By the time their complaints were filed in the district court, such relief would have resulted in their immediate release. Accordingly, these suits were held to be within the core of habeas corpus. The Court carefully indicated, however, that the result would have been the same had the practical effect of a grant of the requested relief been merely a shortening of the duration of the sentence rather than immediate release. The Court articulated as a rationale for its ruling the policy of avoiding needless friction in federal-state relationships caused by premature intervention by the federal courts in matters of intimate state concern.

As we have said, plaintiffs disclaim that the purpose of their suits is to effect their release or to shorten the duration of their confinement. Thus, we do not deem this a case where the suits were close to the core of habeas corpus or "as close to the core of habeas corpus as an attack on the prisoner's conviction," as discussed and defined in *Preiser*.

Notwithstanding the apparent inapplicability of *Preiser*, in the instant cases the defendants argue that the policy of federal-state comity is broad enough to apply to suits seeking redetermination of parole suitability under court mandated procedures affording procedural due process. It is true that the Supreme Court spoke of the interest of a state in having an initial opportunity to correct difficulties and disputes which arise in the course of its relationship with its prisoners, and that the language employed was broad enough to cover any dispute between the state and its prisoners concerning the manner in which the state's parole system was administered. See 411 U.S. at —. However, the Supreme Court also took pains to reaffirm its holdings in a series of prior cases that 42 U.S.C. § 1983 was a proper vehicle for challenge of certain kinds of prison conditions. See, e.g., Houghton v. Shafer, 392 U.S. 639 (1968). See also Procunier v. Martinez, —U.S.— (April 29, 1974) (decided after *Preiser*). Thus, it appears that the exhaustion requirement under the habeas statute does not apply to all suits by prisoners seeking to challenge the manner in which the state penal system is administered. Only such suits as challenge the "constitutionality of . . . physical confinement itself and [seek] either immediate release from that confinement or the shortening of its duration" are subject to the exhaustion requirement.

Our view that these are not cases which fall within the *Preiser* doctrine finds support in the construction placed on the holding in *Preiser* in Wolff v. McDonnell, —U.S.— (June 26, 1974). In *Wolff*, an inmate in a Nebraska prison brought a class action asserting that prison disciplinary proceedings violated due process. The relief sought was threefold: (1) the restoration of good time, (2) that a plan be submitted by the prison authorities for a hearing procedure in connection with withholding and forfeiture of good time which comported with due process, and (3) damages for the deprivation of civil rights resulting from unconstitutional procedures. The claim was made that under *Preiser* the validity of the procedures for depriving prisoners of good-time credits could not be considered in a suit brought

under 42 U.S.C. § 1983. That claim was rejected, however, in the following language:

> The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under *Preiser*. But the complaint also sought damages; and *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. 411 U.S. at 499, n. 14. Respondent's damage claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a damage award would not be barred by *Preiser;* and *because under that case, only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.*
>
> We therefore conclude that *it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking goodtime credits and to fashion appropriate remedies for any constitutional violations ascertained*, short of ordering the actual restoration of good time already cancelled. (Emphasis added; footnote eliminated) —U.S. at —.

On the authority of *Preiser* and *Wolff*, we therefore hold that plaintiffs may litigate their due process objections to defendant's parole eligibility proceedings in a suit under 42 U.S.C. § 1983 without the need for exhaustion under 28 U.S.C. § 2254 (b).

Accordingly, we reverse the judgments of the district courts and remand the cases for further proceedings consistent with the views we have expressed.

REVERSED AND REMANDED.

Albert V. Bryan, Senior Circuit Judge, dissenting:

State control of prisoners convicted under its laws and still in its custody under judgments of its courts is radically infringed, if not defeated, by today's majority opinion. For me it affronts statutory and decisional commandments against Federal disruption of State penal systems. Hence I cannot here join my brothers.

Appellants, inmates of State correctional institutions, brand as unconstitutional the local pattern of parole procedure. In my view they should be required to resort first to their respective State courts, with the right afterwards, if unsuccessful there, to assert in the United States District Court, by way of habeas corpus, their present claims. Here the reverse course is pursued: the State tribunals are skirted and these suits commenced in the Federal courts. The short-cut is to plead the suits under the Civil Rights Act of 1871, 42 USC 1983[1].

The several District Courts dismissed the suits on varying grounds. However, the results were altogether correct and I would affirm in each instance.

The appellants flout the precept of Preiser v. Rodriguez, 411 US 475 (1973) avowing the policy and mandate of Congress, as announced in 28 USC 2254 (b)[2], to be that complaints like the present ones must first be taken to the State courts. The majority would escape *Preiser* on the premise that the instant suits

---

1. § 1983. "Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2. § 2254(b). "State custody; remedies in Federal courts
* * * * *
(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

were saved from its constriction by Wolff v. McDonnell, —US—, 42 LW 5190 (June 26, 1974). Dissection of the two decisions will, I think, reveal the conclusion untenable.

To demonstrate fully the infirmity of the reversal now ordered, reiteration of some of the facts in suit is unavoidable. However, there is no occasion to descant, as the majority does, on whether Fourteenth Amendment due process is a requisite of hearings on the suitability of inmates for parole; for my conclusion this right may be conceded arguendo. The only question is the proper procedure and the proper forum. To begin, it is to be noted that the plaintiffs are not asking damages; they are not pressing for parole; they are not attacking the parole systems; they are not complaining of the refusal of parole. The burden of their complaints is a constitutional assault upon procedures for pre-parole consideration of parole eligibles. A declaratory judgment of invalidity of this earlier step in parole consideration and an implementing injunction against it are prayed.

The grievances in each instance may be summed as follows: the prisoner was granted no interviews, or at least none lasting more than a few minutes; he was not apprised of any objection to his release; no opportunity was afforded to verify the correctness of, or comment upon, any adverse information in his prison record; no chance was given him to say why he thought himself deserving of *consideration* for parole; no criteria for board judgment was outlined to him; and if his application were denied, only the decision was conveyed to him, unaccompanied by the reasons for the determination or a reference to disqualifying evidence.

In the North Carolina case the District Court decreed that relief in the premises was not available under § 1983 to a State prisoner. Its view was that § 1983 is not a means for evaluation of State parole procedures. In South Carolina the District Judge, following *Preiser*, dismissed the action, noting plaintiff's failure to exhaust remedies available under State law and concluding that habeas corpus was the only means of relief open to the complainant.

Preiser makes quite clear that, because of the mandates of 28 USC 2254(b), the *sole* remedy in the Federal courts for the unconstitutional detention of persons under State court judgments is habeas corpus, after exhaustion of the remedies, if any, provided by the State to protect their rights. True, *Preiser* dealt with claims for immediate release from custody, but its teaching is broad enough to exclude the plaintiffs' attempts to sue at once in § 1983. To forego initial recourse to the State authorities would be to disregard the fundamental and compelling reason of the decision: that § 2254(b) was intended to prevent friction between the States and the Federal government in adjudicating the rights of State prisoners. Permitting recourse to § 1983 disrupts this accommodation, and so is impermissible here.

This procedural pattern logically embraces solution of the grievances now pleaded. They relate wholly to *detention* of persons under State court judgments. They do not touch upon any other circumstance of imprisonment, such, for example, as the physical conditions or treatment in the custody. A parole hearing although it may be only an intermediate consideration of an inmate's preparedness for parole—and not a final determination of release or retention—is nonetheless an event in the chain of ultimate detention. It is intended to, and eventually may, affect the duration of the incarceration, and this possibility puts it within the compass of habeas corpus. *Preiser* wrote directly to the point:

> "So, even if restoration of respondents' good-time credits had *merely shortened the length of their confinement, rather than required immediate discharge* from that confinement, *their suits would still have been within the core of habeas corpus* in attacking the very duration of their physical confinement itself. It is beyond doubt, then, that the respondents could have sought and obtained fully effective relief through federal habeas corpus proceedings." (Accent added.) Preiser v. Rodriguez, *supra* at 487-488.

Preiser squarely refuted any suggestion that the language of § 1983 would permit the appellants to employ it as they now attempt. The opinion summarizes:

> "In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or *length* of their confinement, and that specific determination must override the general terms of § 1983." *Id.* at 490. (Accent added.)

Again:

> "The rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity. . . .
>
> "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. . . . *The strong considerations of comity* that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also *require giving the States the first opportunity to correct the errors made in the internal administration of their prisons.*" *Id.* at 491. (Accent added.)

Notwithstanding these deliberated enunciations the majority here volunteers the proposition that only suits challenging the constitutionality of physical confinement and demanding release or lesser detention are within the exhaustion requirement of § 2254 (b). As just demonstrated, this unauthenticated deduction does violence to the words of the Supreme Court.

It is not questioned now that both North Carolina and South Carolina provide remedies quite adequate and available, within the intent of § 2254 (b), to the respective appellant prisoners, either through administrative agencies or State court actions. Both States through their counsel have told this court that remedies of review exist, and there is no contradiction of these representations. At least the appellants were bound to make the

effort. Furthermore, even if there is no State provision for relief, the appellants may seek Federal *habeas corpus*. Under *Preiser* absence of State remedies does not in any event authorize recourse to § 1983.

Preiser was not modified by *Wolff* in the former's exalting of the State remedy over an action under § 1983. The distinction was simply and explicity laid out in both *Preiser* and *Wolff*. It is this: that if no damages are claimed, § 1983 is not invocable; if damages are demanded, the claim is triable under § 1983. But even then issues other than damages are entertainable under § 1983 only so far as they are ancillary to the establishment of damages. The reason for reserving this utilization of § 1983 is that damages are not recoverable in habeas corpus.

Damages, to repeat, were not sought in the instant causes. They were not asked in *Preiser*, and that is the very ground on which *Preiser* barred resort to § 1983. Damages *were* sued for in *Wolff* and that was the very point for its allowance of § 1983 use.

This syllogism is confirmed in *Preiser*:

> "The answer to this contention [res judicata as to damages] is that the respondents here sought no damages, but only equitable relief—restoration of their good-time credits —and our holding today is limited to that situation. If a state prisoner is seeking *damages*, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a *damages* claim, habeas corpus is *not* an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, a damage action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies." 411 US at 494. (Accent added.)

The syllogism is paralleled in *Wolff*.

"The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under *Preiser*. But the complaint also sought *damages;* and *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. 411 U.S., at 499, n. 14. Respondent's *damage* claim was therefore properly before the District Court and *required* determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgment as a *predicate* to a *damage* award would not be barred by *Preiser;* and because under that case, only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of *ancillary* relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations." (Accent added.) Wolff v. McDonnell, *supra* at 5195.

In § 2254 (b) Congress enjoined upon the Federal courts the obligation of honoring comity when entering State provinces. Accordingly, the present appellants should be remanded to the appropriate State agencies or courts, for the nub of these controversies is primarily a State matter, and whenever resort is to a court then habeas corpus is the exclusive remedy.

I would affirm the District Court in both appeals.

"Appendix B"
United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 73-1751

Howard E. Bradford, individually and on behalf of all others similarly situated,

Appellant,

v.

Robert Weinstein, John H. Baker, Jr., and Wiley Earp, individually and in their official capacities as members of the North Carolina Board of Paroles, Ben L. Baker, individually and in his official capacity as supervisor of combined records, V. L. Bounds, individually and in his official capacity as commissioner of correction of the State of North Carolina, their agents, employees, and successors in interest,

Appellees.

No. 73-1921

Levi Jenkins, on behalf of himself and all others similarly situated,

Appellant,

v.

Walter D. Tyler, John E. Huss, H. L. Lackey, Charles R. Sanders, Jr., Marion Beasley, and Elizabeth M. Myers, Individually and as the South Carolina Probation, Parole and Pardon Board,

Appellees.

ORDER

The petitions for rehearing of the respective appellees in the above-entitled cases, containing suggestions for rehearing in banc, have been submitted to the active judges of the court and Judge Bryan. A poll of the court on each of the suggestions for rehearing was requested, and in the poll a majority of the judges eligible to vote therein have voted to deny rehearing in banc. A majority of the panel has voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing in banc be, and they are hereby, denied.

Judge Bryan dissents from the denial of rehearing. Judge Russell, Judge Field and Judge Widener dissent from the denial of rehearing in banc for the reasons set forth in Judge Bryan's dissenting panel opinion.

For the Court:
Harry L. Widener
United States Circuit Judge

Albert V. Bryan, Senior Circuit Judge, dissenting from the reversal of the District Court:

For me there is incongruity in the decision now pronounced on the *merits*, that is, on the substantive issue in these cases. On an in banc hearing eight judges would have been eligible to decide on the merits. Four of these judges, as the order in respect to the rehearing clearly and explicitly reveals, favored reversal while four were for affirmance on the merits. Nevertheless, as announced, the decision on the merits is a reversal when, it seems to me, it should be an affirmance because of an equally divided court. Thus the announced decision does not express the *will* of the court. There was no majority for reversal. The circumstance that the judges' views on the merits appeared in the rehearing order does not justify ignoring it, for no matter where it appeared it was the fact, the actuality. Not to recognize it now, for what it is, is to prefer procedure to substance.

The announced result comes about by an over-rigid application, as I see it, of the statute denying to a senior judge eligibility to vote for the grant or refusal of an application for a rehearing in banc. 28 USC 46(c). Instantly, the senior may sit in the cases, both in-panel and in-banc, and so he is not barred at any stage from making known his resolution of the substantive issue. I do not believe the Supreme Court intended in Moody v. Albemarle Paper Company, 42 USLW (June 17, 1973) to allow his disqualification in the collateral or procedural question—a rehearing—to extend into the decision on the *merits* of the case. To do so disregards the will of the court as *that* will indelibly appears from the judges' individual expressions on the merits when the rehearing was denied. Rather, the exclusive intent was to speak to the control of the award of in banc rehearings.

I would affirm the District Court's judgment.

Supreme Court, U. S.
FILED
JUL 28 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

October Term, 1974

No. 74-1287

ROBERT WEINSTEIN, et al.,

Petitioners

v.

HOWARD E. BRADFORD, et al.,

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED
April 14, 1975.

CERTIORARI GRANTED June 2, 1975

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Order filed May 1, 1973, by Algernon L. Butler, Chief Judge of the United States District Court for the Eastern District of North Carolina, denying relief and dismissing the Complaint in BRADFORD v. WEINSTEIN, 357 F. Supp. 1127 (E.D.N.C. 1973) 17

Opinion of the United States Court of Appeals for the Fourth Circuit filed November 22, 1974, in BRADFORD v. WEINSTEIN, ... F. 2d .... (4th Cir. 1974) ..... *

Order of the Fourth Circuit Court of Appeals filed January 15, 1975, in BRADFORD v. WEINSTEIN, No. 73-1751, denying the Petition for Rehearing and Motion for Rehearing En Banc (with dissent) ..... **

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* The Opinion of the Fourth Circuit Court of Appeals in BRADFORD v. WEINSTEIN, .. F. 2d .. (4th Cir. 1974) appears at pp. 9-25 of the printed Petition for Writ of Certiorari filed in this case on April 14, 1975.

** The Order of the Fourth Circuit Court of Appeals filed January 15, 1975, denying the Petition for Rehearing and Motion for Rehearing En Banc, appears at pp. 26-28 of the printed Petition for Writ of Certiorari filed in this case on April 14, 1975.

RELEVANT DOCKET ENTRIES

May 1, 1973 — Complaint filed in forma pauperis (only for the purpose of the record) in BRADFORD v. WEINSTEIN, Civil No. 4308 — Raleigh (E.D.N.C.)

May 1, 1973 — Order filed by Chief Judge Algernon L. Butler denying relief and dismissing the Complaint in BRADFORD v. WEINSTEIN, 357 F. Supp. 1127 (E.D.N.C. 1973)

May 14, 1973 — Howard E. Bradford filed Notice of Appeal to the Fourth Circuit Court of Appeals

September 19, 1973 — Certificate of Probable Cause filed and Professors Spritzer and Lesnick appointed to represent Bradford on appeal

February 4, 1974 — Oral arguments heard in the United States Court of Appeals for the Fourth Circuit

November 22, 1974 — Opinion of the United States Court of Appeals for the Fourth Circuit filed in BRADFORD v. WEINSTEIN, ... F. 2d .... (4th Cir. 1974)

December 6, 1974 — Petition for Rehearing and Motion for Rehearing En Banc filed in the Court of Appeals for the Fourth Circuit

January 15, 1975 — Order entered by the Court of Appeals for the Fourth Circuit denying the Petition for Rehearing and Motion for Rehearing En Banc

January 23, 1975 — Notice of Appeal filed in the Court of Appeals for the Fourth Circuit

January 24, 1975 — Order entered by the United States Court of Appeals for the Fourth Circuit staying the mandate in BRADFORD v. WEINSTEIN, ... F. 2d .... (4th Cir. 1974)

April 14, 1975 — Petition for Writ of Certiorari filed in the Supreme Court of the United States in WEINSTEIN v. BRADFORD, No. 74-1287, October Term, 1974

June 2, 1975 — Petition for Writ of Certiorari granted in WEINSTEIN v. BRADFORD, No. 74-1287, October Term, 1974

Donald W. Morgan
Prisoner Legal Assistant
Post Office Box 137
Tillery, North Carolina 27887
For The Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
CIVIL ACTION NO. 4308

HOWARD E. BRADFORD and ROBERT E. HARRIS, individually and on behalf of all others similarly situated,
Plaintiffs
-V-
ROBERT WEINSTEIN, JOHN H. BAKER, JR. and WILEY EARP, individually and in their official capacities as members of the NORTH CAROLINA BOARD OF PAROLES, BEN L. BAKER, individually and in his official capacity as SUPERVISOR OF COMBINED RECORDS, V. L. BOUNDS, individually and in his official capacity as COMMISSIONER OF CORRECTION of the STATE OF NORTH CAROLINA; their agents, employees, and successors in interest,
Defendants.

COMPLAINT FOR VIOLATION OF CIVIL RIGHTS, FOR DECLARATORY AND INJUNCTIVE RELIEF

JURISDICTION

1. This is a civil action brought by plaintiffs on behalf of themselves and all others similarly situated under Section 1343 of Title 28 of the United States Code, to redress the deprivation of rights, privileges and immunities secured to them by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. Pursuant to 42 U.S.C. Sections 1983 and 1988 and 28 U.S.C. Sections 2201 and 2202, plaintiffs seek declaratory and injunctive relief to remedy the unconstitutional conduct of defendants complained of herein.

NATURE OF THE CASE

2.a. Plaintiffs and their classes are inmates in the North Carolina Department of Correction. They challenge the hearing procedures whereby defendants, members of the North Carolina Board of Paroles and the Department of Correction, grant, deny, or rescind parole, conditional release, fix and refix parole eligibility dates, and whereby they purport to adjudicate infractions of prison rules. Because these decisions involve fundamental rights of liberty and result in grievous loss for thousands of North Carolina prisoners by depriving them of that liberty, the process of making these decisions must meet the due process requirements of the Fourteenth Amendment.

b. The decisional law of the Federal Court System governing state prison inmate rights forbids these decisions to be made in an arbitrary manner or in the absence of "good cause". Therefore the Board of Paroles and the Department of Correction, pursuant to State Constitutional and statutory grants of power, have established hearing procedures at which hearings these decisions are made. Where, as here, such hearings are required to be held by federal decisional law, they must be fair and impartial in the constitutional sense, as is more fully described below.

c. The hearing procedures actually followed by defendant members and administrative officers of the Board of Paroles

and the Department of Correction are in fact completely lacking in both procedural and substantive due process, and in rudimentary fairness or equity. Hearings held by the Board of Paroles are defective in that:

1) There is no criteria or guide lines used by the Board of Paroles to determine whether an inmate shall be given a parole hearing on his parole eligibility date or be given a substitute "review" of his record jacket;

2) Inmates who are to appear before a panel of members or representatives of the Board of Paroles or those who are given a substitute "review" of their prison jackets, are not informed as to the material the panel has before it and are absolutely prohibited from reviewing their central record jacket, upon which the Board of Paroles will in large part base its decision;

3) That before any inmate is allowed to mail legal pleadings, including Habeas Corpus, to any state or federal court, he must first permit correctional officials to photocopy the legal material under threat of punishment; that the copies are placed in the inmates' central record folder; that defendant Bounds and his correctional staff furnish written material from the central record folder of inmates who shall appear before or have their records reviewed, by panels of members or representatives of the Board of Paroles showing that the inmate in question has been a writ-writer and has made persistent use of the courts by filing legal pleadings against correctional officials or his conviction, or both and that said material is reviewed by the Board of Paroles and is often used to deny parole;

4) Inmates who are financially able to retain counsel may be represented by counsel at parole hearings, but appointment of counsel at the request of an indigent is absolutely denied;

5) Hearings average about ten minutes, although the

median time is considerably less. Decisions are made in less than five minutes, and without any extended or meaningful discussion of the case;

6) No written statements of the reasons for decisions or of the evidence relied on are provided the inmate;

7) As more fully alleged hereafter, plaintiffs allege that the Board of Paroles members have no expertise, are biased, and base their decisions on false, inaccurate, and misleading information.

d. Hearings are also conducted by the Department of Correction. These hearings purport to adjudicate infractions of prison rules. Consequent to such adjudications prisoners may be punished by transfer, assignment to administrative or punitive segregation, permanent reclassification to close or maximum security, and may suffer other loss of the restricted liberty which is available to the general prison population. Reports concerning these alleged infractions are placed in the files of plaintiffs and their class, and said material is reviewed by the Board of Paroles, and is often used to deny parole or rescind parole eligibility dates.

e. The hearing procedures employed by defendant V. L. Bounds and the Department of Correction and the Board of Paroles in their said hearings are constitutionally infirm because they are not designed to be nor are they effective to expose and develop the critical facts upon which the Department of Correction and the Board of Paroles' decisions must be made, or to apply to such facts the appropriate criteria in order to reach a rational and correct decision as a matter of law. As a direct result of these defective procedures, the decisions routinely reached by the Department of Correction and the Board of Paroles are so arbitrary, discriminatory and otherwise illegal as to violate plaintiffs' rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

f. The combined procedures of the Department of Correc-

tion and the Board of Paroles result not in a correctional system, but in a chaotic limbo where prisoners, including plaintiffs and their class, must spend unknowable and unlimited numbers of years of imprisonment soliciting the favor and humoring the impulse, whim, caprice, and mood of correctional staff, Board of Parole members and representatives, and parole officers. False, biased, prejudicial, and distorted allegations from inmate informers, associates on the outside, correctional staff, unqualified medical assistants, college student psuedo-psychologists and others, are accumulated in the prisoners' record folder and accorded weight impossible to measure or ascertain in the decisions of the Board of Paroles and the Department of Correction.

g. Accordingly, plaintiffs seek declaratory and injunctive relief to require that defendants henceforth afford plaintiffs and their class fundamental due process safeguards in the proceedings and hearings which determine the contents of the inmate record jackets at which the Board of Paroles fixes or refuses to fix parole eligibility dates and grants or denies parole, rescinds or revokes parole, conditional release on indeterminate sentences, and at those hearings which are conducted to review adverse determinations within the administrative channels of the Parole Board itself. The minimum due process safeguards to assure evidentiary integrity to these hearings and procedures include the right to:

1) The removal of all legal pleadings or notations of legal pleadings from inmate record jackets and that the Commissioner of Correction and employees under his control be prohibited from informing the Board of Paroles whether an inmate has pending petitions or has been a writ-writer or jailhouse lawyer in the past;

2) Receive timely notice of all alleged violations of parole, conditional release or infractions of prison rules which may lead to the denying of indeterminate sentence determination or parole, or the rescinding of parole;

3) Conduct a timely review of the entire inmate record folder and all other documents which will be available to the Board of Paroles or Department of Correction in reaching their decisions;

4) Adduce favorable evidence and cross-examine adverse witnesses and persons submitting adverse reports at disciplinary hearings and at parole board hearings;

5) Be represented by appointed counsel at the hearings conducted by the Board of Paroles;

6) Be heard by an impartial and unbiased panel or official who has had no connection with any of the alleged violations or other operative facts, including the prisoners' original conviction or earlier revocations, upon which the Board of Paroles' decision will turn. In this connection, a procedure is required, and must be evolved, which furnishes the name of the Parole Board representatives or members who are scheduled to hear whatever type of hearing is pending in sufficient time to permit the prisoner to exercise an option to disqualify a representative or member for previous involvements with the prisoners' case, or for personal bias or prejudice from previous relationships with said representative or member;

7) Be represented in person or by counsel at any additional appellate or administrative review proceedings conducted by the Parole Board with due process procedures appropriate to a reviewing agency.

PARTIES

3. Plaintiff Howard E. Bradford, is a prisoner in the custody of the Department of Correction of The State of North Carolina presently confined at the Caledonia Correctional Institution at Tillery, North Carolina. Plaintiff Robert E. Harris is a prisoner in the custody of the Department of Correction of the

State of North Carolina presently confined at the Caledonia Correctional Institution at Tillery, North Carolina.

4. Plaintiffs bring this action as a class action, individually and on behalf of all others similarly situated. The class is defined as follows: all inmates in the custody of the Department of Correction, whether they have been considered for parole, paroled or not, who shall at a future date appear before the Board of Paroles or have their records reviewed for purposes of determining whether the Parole Board will grant or deny them parole pursuant to the procedures complained of herein. The class is represented by the named plaintiffs herein.

Plaintiffs bring this action on their own behalf and pursuant to Rule 23 (b) (1) and Rule 23 (b) (2) of the Federal Rules of Civil Procedure, on behalf of approximately 10,000 other inmates of the North Carolina Department of Correction, including all inmates of Women's Prison at Raleigh, subject to defendants' jurisdiction and affected by the policies, practices or acts of defendants complained of herein. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the named plaintiffs herein are typical of the claims of the class, and plaintiffs will fairly and adequately protect the interest of the other members of the class. In addition, the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members thereof which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and, the parties opposing the class have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

5. Defendants Robert Weinstein, John H. Baker, Jr., and Wiley Earp are members of the Board of Paroles. In such capacity said defendants are responsible for designing and

carrying out constitutional, lawful and fair procedures to determine, inter alia, whether or not to:

a. grant parole to an inmate;

b. rescind an earlier decision to grant parole to an inmate;

c. revoke an inmate's parole;

d. review said proceedings and determinations upon request of an adversely affected inmate.

On information and belief defendant Ben L. Baker, Supervisor of Combined Records is responsible for the implementation of the responsibilities of the defendant members as hereinafter described. Defendant Baker has in fact assisted in making policy, designing procedures, making de facto determinations critical to the decisions made by the Parole Board, and in interpreting the laws under which the Parole Board operates to deny plaintiffs and their classes fundamental fairness and due process of law. Defendant Baker is the chief staff officer and handles all administrative functions as delegated and determined by the Parole Board. He is the official keeper of the Parole Board's records and liaison officer with defendant V. L. Bounds and the staff of the Department of Correction.

6. Defendant V. L. Bounds is the Commissioner of the Department of Correction and in such capacity is responsible for the overall operation of the Department of Correction, the promulgation and enforcement of rules governing the confinement of inmates subject to the custody of the Department of Correction, including the proceedings had on disciplinary charges, and the keeping of inmate record folders relied on by the Board of Paroles in making the determinations described in paragraph 5, supra, and the safety of each such inmate.

7. Defendants are sued both individually and in their official capacities. In depriving plaintiffs of their constitutional rights, as set forth hereinafter, defendants and each of them have acted and refused to act under color of the statutes, customs and usages of the State of North Carolina.

FACTS

8.a. In December, 1970 plaintiff Howard E. Bradford was considered for parole without appointed counsel or a parole hearing. His parole plan was based upon his working with Petroleum Tank Services, Inc., of Charlotte, North Carolina. Exhibits A and B attached hereto and made a part hereof. Notwithstanding the above, the Board of Paroles arbitrarily denied plaintiff parole. Exhibit C attached hereto and made a part hereof.

b. On or about March 20, 1972 plaintiff again was considered without appointed counsel or a parole hearing, for parole. On this occasion the Board of Paroles arbitrarily refused to parole him.

c. On or about September 20, 1972 plaintiff again was considered for parole without appointed counsel or a parole hearing. The Parole Board arbitrarily refused to parole him.

d. At each of the foregoing "reviews" conducted by the Board of Paroles without plaintiff's presence, the defendant parole members acted upon information which was false, and which required sophisticated assessment and consideration of plaintiff's case. The Board of Paroles denied plaintiff parole without good cause. Exhibit E attached hereto and made a part hereof.

9. In February, 1973 plaintiff Robert E. Harris was considered for parole without a parole hearing or appointment of counsel. His parole plan was based upon his working with Nello L. Teer Company of Durham, North Carolina, at $1.90 an hour, with a 55 hour work week. The Board of Paroles arbitrarily denied parole in his case notwithstanding that he is a first offender, has been in honor grade status for ten months with an overall spotless prison record. Plaintiff Harris was not permitted to know the information upon which the Board of Paroles based their decision. Exhibits 1 and 2 attached hereto and made a part hereof. Plaintiff was not permitted to rebut the "previous record" referred to by defendants' agent in exhibit 1. He was not permitted to present any evidence in his behalf. The Board of Paroles denied plaintiff parole without good cause.

10. Plaintiffs are informed and believe and therefore allege, in addition to the allegations of paragraph 2 incorporated herein by reference, that:

a. Defendant Parole Board members, hearing representatives, and officers have no expertise in arriving at fair decisions concerning parole date rescission, parole revocation and parole release. To the contrary, said members, representatives, and administrative officers are quite unsuited for the task as a result of:

(i) The narrow partisan background which every one of them possesses and by the punitive anti-prisoner biases which they possess; and

(ii) Their experience as Parole Board members, representatives or administrative officer, which has led them to adopt rigid and stereotyped thinking patterns pursuant to which they look more for the quality of servility than for those qualities which would, in fact, portend success on parole.

b. The persons who serve as members and representatives of the Board of Paroles do not reflect a wide or representative cross-section of the population of North Carolina, but instead manifest attitudes which militate against a fair and open attitude in assessing parole readiness.

c. At the parole "review sessions" or a rare hearing, parole board members rely heavily upon written material which is unreliable, because composed of reports which (i) are often false, malicious, inaccurate or misleading, (ii) are essentially one-sided, insofar as they contain almost exclusively adverse material, without a corresponding emphasis upon the positive aspects of an inmate's prison behavior, (iii) are placed in an inmate's file through a process which contains no substantial

safeguards whatsoever to determine reliability, and (iv) may not be reviewed by the inmate who is therefore unable to refute even the most demonstrably untrue information.

d. During inmate record parole "review sessions" Parole Board members do not have sufficient time (i) to thoroughly review the relevant written material before them, (ii) to conduct a thorough and meaningful interview with the inmate in cases of personal hearings, or ((iii) to arrive at an informed decision pursuant to a discussion of the case.

e. Because of the foregoing considerations set forth in this paragraph, the decisions reached and the actions taken by Parole Board members and representatives herein complained of, are based upon (1) mere whim and caprice, reflecting primarily the Board member's personal predilections, (2) discriminatory considerations, reflecting primarily the Board member's own political, racial, and other biases and/or (3) criteria which in fact do not correspond to the likelihood of success on parole, and therefore are not based upon the "good cause" required by State law and the Federal Constitution.

f. Hearings held by the Department of Correction to adjudicate alleged rules infractions and to impose disciplinary sanctions including prolonged isolation and loss of privileges or to write and lodge reports of infractions and other incidents in the permanent inmate record files are conducted arbitrarily and capriciously. Investigation of the facts of such alleged infractions is biased and incomplete and inmates are not given an opportunity to rebut or even to see the evidence against them. When formal hearings are held at all they are conducted by partial and interested personnel. The inmate is not permitted to see his inmate record file even though items in said file are frequently used as evidence against him. These procedures are not designed to and in fact do not develop the critical facts on which administrative decisions are made and reports made.

g. State prisoners perceive Board of Parole and Department

of Correction hearings to be eminently unfair, and they share a widespread belief that the Board of Paroles and the Department of Correction consistently act in an arbitrary, discriminatory, and illegal manner; that their inmate central files, upon which the Parole Board places heavy reliance, contains much untrue and misleading information; and that the indeterminate sentence conditional release implemented through the type of "review" procedures conducted by the Dpartment of Correction, is fundamentally unfair. In fact, the type of Parole Board and Department of Correction "reviews" described herein cause grave and extensive anxiety and suffering.

h. The intended benefits of the indeterminate sentence have, in fact, been utterly perverted by the defective "reviews" conducted by the Department of Corrections, as described herein. The result is that North Carolina presently exacts some of the longest sentences in the nation, and is holding in confinement literally thousands of prisoners who should not be imprisoned by any rational criteria, thereby inflicting needless massive human suffering.

LEGAL CLAIMS

11. While acting under color of the law of the State of North Carolina, as more fully described heretofore, defendants have deprived plaintiffs and their classes of the following rights which are secured to them by the United States Constitution:

a. The right not to have parole release denied by the Parole Board in the absence of "good cause", and fundamental procedural safeguards, secured by the Due Process Clause of the Fourteenth Amendment;

b. The right not to have indeterminate sentence conditional release denied by the Department of Correction in the absence of "good cause", and fundamental procedural safeguards, secured by the Due Process Clause of the Fourteenth Amendment;

c. The right not to have parole release decisions and De-

partment of Correction release decisions made in the absence of appointed counsel in indigent cases and other fundamental procedural safeguards, secured by the Sixth and Fourteenth Amendments to the United States Constitution.

d. The right not to have disciplinary sanctions imposed for alleged violations of prison rules, or reports of said violations placed in inmate central files in the absence of a fair and impartial investigation of the facts, a hearing before an impartial tribunal whenever serious disciplinary sanctions are considered, the right to counsel whenever serious sanctions are considered, and the right to view and examine the inmate's central file, all of which rights are secured by the Fifth and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

e. The right to be free from prolonged incarceration and isolation in the absence of any of the procedural safeguards enumerated above under conditions which shock the general conscience and are intolerable to fundamental fairness, which constitutes punishment greatly disproportionate to any offense for which they are imposed and which go beyond what is necessary to accomplish any legitimate penal aim, all secured to plaintiffs and their class under the Eighth Amendment to the Constitution of the United States.

12. An actual controversy has arisen and now exists relating to the rights and duties of the parties, in that defendants have denied and continue to deny to plaintiffs and their classes the constitutional rights set forth in paragraph 11 hereof. As a result of these violations, plaintiffs and the members of their classes have been and will continue to be irreparably injured by the aforesaid conduct of defendants unless this Court grants the declaratory and injunctive relief which they seek. Plaintiffs have no plain, adequate, or complete remedy at law to redress the unlawful acts complained of herein.

WHEREFORE, plaintiffs and their classes request that this Court:

1. Issue a declaratory judgment that the acts of defendants listed in this Complaint contravene the rights of plaintiffs and their class under the Fifth, Sixth, and Eighth Amendments and the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution:

2. Issue a preliminary and thereafter a permanent injunction requiring defendants, their agents, employees and representatives to accord plaintiffs and their classes the following rights:

A. (1) timely notice of all proceedings and hearings to perform any of the acts enumerated in subparagraph B and timely and informative notice of all charges including a statement of the charge and of the evidence to be relied upon; and an opportunity to conduct a timely review of the entire inmate central file;

(2) an opportunity to be heard, to present witnesses, and to cross-examine witnesses;

(3) the right to be represented by counsel at any hearing;

(4) the right to be heard by an unbiased panel or official and the right to challenge any panel or official for cause;

(5) the right to a verbatim transcript of any hearing and a written statement of the reasons for performing or refusing to perform the acts enumerated in subparagraph (b) and a written statement of the evidence relied on;

B. The hearings at which the guarantees enumerated above are to be accorded are:

(1) granting or denying parole, indeterminate sentence release, revoking, suspending or rescinding parole or otherwise increasing length of imprisonment;

(2) imposing serious disciplinary sanctions.

3. Certify that this action may be maintained as a class action;

4. Grant such other and further relief as to the Court seems appropriate including retaining jurisdiction in this matter.

Dated: March 2, 1973

Respectfully submitted,
Howard E. Bradford
Robert E. Harris
Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
NO. 4308 CIVIL

HOWARD E. BRADFORD and ROBERT E. HARRIS, individually and on behalf of all others similarly situated,
Plaintiffs,
v.
ROBERT WEINSTEIN, JOHN H. BAKER, JR. and WILEY EARP, individually and in their official capacities as members of the NORTH CAROLINA BOARD OF PAROLES, BEN L. BAKER, individually and in his official capacity as SUPERVISOR OF COMBINED RECORDS, V. L. BOUNDS, individually and in his official capacity as COMMISSIONER OF CORRECTION of the STATE OF NORTH CAROLINA; their agents, employees, and successors in interest,
Defendants.

ORDER

The plaintiffs seek leave to file in forma pauperis a civil rights action under 42 U.S.C. § 1983. Both plaintiffs are state prisoners incarcerated at the Caledonia Prison Unit at Tillery, North Carolina.

The plaintiffs challenge, as being constitutionally infirm, the disciplinary procedures employed by officials of the state prisons in adjudicating infractions of prison rules, and the procedures followed by the North Carolina Board of Paroles in deciding whether or not to grant parole. Three members of the Board of Paroles are named as defendants, as well as the Commissioner of Correction and "their agents, employees, and successors in interest".

The essence of the complaint is that the challenged procedures fail to comply with the Due Process Clause of the Constitution. In regard to the procedures of the Board of Paroles, the plaintiffs allege (1) that there are no criteria for determining whether an inmate is given a parole suitability hearing or whether he is given a substitute review of his records for determining parole suitability, (2) that inmates are not informed as to the material to which the Board of Paroles has access, and are prohibited from seeing their records folders; (3) that inmates must permit prison officials to copy legal pleadings and that such copies are entered into the inmates' folders; (4) that counsel is not provided for indigent inmates at proceeding in which the granting of parole is considered; (5) that hearings of the Board of Paroles last only five or ten minutes, and that that is an insufficient time in which to adequately determine whether or not an inmate should be paroled; (6) that the Board of Paroles members have no expertise in matters of penology, and base their decisions on false, inaccurate, and misleading information. There are further allegations that the Board of Paroles is not so composed as to reflect a cross-section of the state and that the Board members have poor thinking processes. Plaintiffs also allege that the Board of Paroles relies to a great extent on written information that is placed in inmates' folders through processes with no safeguards for reliability.

As to procedures used by disciplinary boards or committees, the plaintiffs allege that records of such proceedings are placed in inmates' folders and considered by the Board of Paroles in

deciding whether to grant parole; that such procedures are biased and incomplete; and that disciplinary investigations do not develop critical facts. Plaintiffs specifically allege that an inmate is not given an opportunity to rebut or even see the evidence against him in a disciplinary proceeding.

The plaintiffs seek a declaratory judgment and injunctive relief to provide the following "rights" in all disciplinary and parole procedures: timely notice of all proceedings; an opportunity by an inmate to review his entire file; an opportunity to be heard, to present witnesses, and to cross-examine adverse witnesses; the right to be heard by an impartial panel and to challenge any panel member for cause; a verbatim transcript of any proceeding and a statement of the evidence relied upon in reaching a decision; and the right to be represented by counsel, and to have counsel appointed if the inmate is indigent. In addition to these alleged rights, the plaintiffs assert that copies of all legal pleadings should be removed from inmates' files and not disclosed to the Board of Paroles.

The plaintiff Bradford alleges that he has been considered for parole on three occasions, in December of 1970, on March 10, 1972, and on September 20, 1972, and that parole was denied on all three occasions. He alleges that he was denied parole without being present at the proceedings before the Board of Paroles, and without the benefit of a hearing or representation by counsel, and that each denial of parole was arbitrary and without "good cause."

The plaintiff Harris alleges that he was considered for parole in February of 1973 and that he was similarly denied parole arbitrarily and without "good cause." Neither of the plaintiffs states the crime of which he was convicted or the length of the term of imprisonment imposed upon his conviction.

The plaintiffs seek leave to file this action not only on behalf of themselves, but also as a class action pursuant to Rule 23(b) (1) and (2), Federal Rules Civil Procedure, on behalf of all other inmates in the North Carolina prison system, in-

cluding the inmates at the Women's Prison in Raleigh.

Rule 23(a) provides that suits may be maintained as class actions only if the following requirements are satisfied:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

The plaintiffs do not seek to file the action pursuant to Rule 23(b) (3), which would require notice to all prospective members of the class and which would allow each prospective member to request that he or she be excluded from the class.

Parole and discipline are matters which are considered on an individual basis. It does not appear that the claims of the two plaintiffs present "questions of law or fact" in regard to parole and prison discipline, that are common to the 10,000 inmates in the North Carolina prison system. Further, it does not appear that the claims of the plaintiffs are typical of the claims of the class they seek to represent. Given the possibility of divergent interests among the thousands of inmates, it does not appear that the plaintiffs would "fairly and adequately protect the interests of the class." Further, there is a total lack of specificity as to all other inmates. No factual situation pertaining to another inmate is presented in the complaint. In Heckart v. Pate, 52 F.R.D. 224, 227 (N.D.Ill., 1971) an Illinois prison inmate sought to file a civil rights action on behalf of all prison inmates in Illinois as a class. The court said:

> "It is inconceivable that all inmates, or a sufficient number of them to constitute this cause as a class action, have the same interests and share common questions of law or facts . . . .

> An individual prisoner may have individual grievances and may raise questions of his own particular treatment as being violative of his constitutional rights but each case is personal and dependent on particular facts."

It is the opinion of this court that this action cannot be properly maintained as a class action. The court will consider the complaint as it relates to the claims of the named plaintiffs.

The complaint contains broad attacks on procedures followed by the North Carolina Board of Paroles and by prison officials in disciplinary proceedings. The functions of the Board of Paroles are entirely different than those of disciplinary boards, and therefore the allegations concerning each will be dealt with separately.

It is the function of the Board of Paroles to decide whether an inmate should be conditionally released before the expiration of his prison sentence. North Carolina General Statute § 148-60 reads as follows:

> "The time of releasing each prisoner eligible for consideration for parole as provided for herein shall be discretionary, and due consideration shall be given to the reasonable probability that the prisoner will live and remain in liberty without violating the law; that the release of the prisoner is not incompatible with the welfare of society, and that the record of the prisoner during his confinement established that the prisoner is obedient to prison rules and regulations, and has shown the proper respect for prison officials, and due regard and consideration for his fellow prisoners; and that the prisoner harbors no resentment against society or the judge, prosecuting attorneys, or jury that convicted the prisoner."

The Board must weigh all possible benefits of parole as against the possible risks in releasing to society a person who has proved unwilling to obey the law and comport with acceptable social standards. It is often a difficult decision and must be

based on many factors. The granting of parole is a function which necessarily is a matter that must be left to the discretion of parole officials. Menechino v. Oswald, 430 F. 2d 403, 408 (2d Cir. 1970) and Dorado v. Kerr, 454 F. 2d 892, 897 (9th Cir., 1972), cert. denied, 93 S.Ct. 244 (1972).

The plaintiffs challenge the processes of the Board of Paroles as failing to comply with the Due Process Clause. The court is aware of the recent decision of the United States Supreme Court in Morrisey v. Brewer, 92 S.Ct. 2593 (1972), in which the court specifies the due process rights to be accorded a parolee in a parole revocation proceeding. However, this court is of the opinion that a parole revocation proceeding differs from a review by a parole board to determine whether an inmate should be paroled initially. In the former proceeding, the determination is whether the conditional freedom of the parolee should be terminated because of an alleged violation of the conditions of his parole. In a review to decide whether parole should be granted, the determination is whether an inmate is a suitable prospect for return to society.

This court is of the opinion that the Due Process Clause does not apply in procedures designed to determine suitability for parole. See, Menechino v. Oswald, 430 F. 2d 403 (2d Cir., 1970), cert. denied 91 S.Ct. 588 (1971). The inmate is not constitutionally entitled to an adversary and evidentiary hearing on his suitability for parole, nor is he entitled to rebut information in possession of the Board of Paroles which militates against his parole. Lewis v. Rockefeller, 305 F.Supp. 258, 259 (S.D.N.Y. 1969), affirmed 431 F.2d 368. Nor does an inmate have a constitutional right to examine his record or parole board files. Tarlton v. United States, 430 F.2d 1351, 1352 (5th Cir., 1970); Ott v. Ciccone, 326 F.Supp. 609, 612 (W.D.Mo., 1970). Nor is an inmate constitutionally entitled to representation by counsel before the Board when it reviews an inmate's case to determine his suitability for parole. Buchanan v. Clark, 446 F.2d 1379 (5th Cir., 1971), cert. denied, 92 S.Ct. 347 (1971). It was held in Schawartzberg v. United States Board

of Parole, 399 F.2d 297 (10th Cir., 1968) that a prison regulation prohibiting representation by counsel at a parole review was not unconstitutional. An inmate has no constitutional right to have the Board of Paroles specify the reasons for which parole has been denied. Lewis v. Rockefeller, *supra*, and Madden v. New Jersey State Parole Board, 438 F.2d 1189 (3rd Cir., 1971).

The plaintiffs' complaint that copies of an inmate's legal pleadings are placed in his prison file, and thus are available for review by the Board of Paroles, is without merit. Such pleadings are filed with the court and are matters of public record.

Plaintiffs' allegations that the Board of Paroles does not spend sufficient time in considering parole eligibility and that the Board members are incompetent do not raise issues that are proper matters for review by this court.

Nor is there merit in plaintiffs' allegation that the Board does not reflect a fair cross section of the state. The Board is not a jury. An inmate has no right to challenge the participation of a member of the Board who is reviewing his suitability for parole. Plaintiffs allege that much information relied upon by the Board of Paroles is false and misleading. It is not a proper function of the federal judiciary to review the credibility of reports and information received by a state parole board and used in making its determinations. Tarlton v. Clark, 441 F.2d 384, 385 (5th Cir., 1971) cert. denied, 91 S.Ct. 2263 (1971); Brest v. Ciccone, 371 F.2d 981, 982 (8th Cir., 1967).

A final factor which must be given consideration is the burden that would be placed upon the North Carolina Board of Paroles by a holding that due process requirements are constitutionally demanded during parole suitability deliberations. *See*, Menechino v. Oswald, 430 F.2d 403, 409 (2nd Cir. 1970). The administrative burden of the parole system would be enormously increased if each inmate were given a plenary hearing on his suitability for parole. Further burdens would ensue

with requirements of notice, procedures for the appointment of counsel and reporters, subpoenaing and cross-examination of witnesses, compensation of counsel and costs of transcripts, and the preparation of findings and conclusions by the Board. Such requirements would likely result in congested dockets before the Board of Paroles and result in undue delay in reviewing the individual cases of 10,000 prisoners in the system as each becomes eligible for parole consideration. The state is not constitutionally required to provide for the parole of prisoners, and if plaintiffs' demands were enforced, and the burden on the prison system became too great, the state might find it necessary or desirable to terminate the parole system.

This court has serious doubts about the propriety of federal judicial intervention into the matter of state parole procedures. In *Menechino v. Oswald, supra*, the court said:

> "In the last analysis the Board's determination as to whether a prisoner is a good parole risk represents an aspect of state prison discipline, not an adjudication of rights in an adversary proceeding. Ross v. Haskins, 388 F.2d 91 (6th Cir., 1968). If the federal judiciary, in the name of the Due Process Clause, undertook the supervision of such disciplinary procedures, it would become inextricably involved, upon the suits that would inevitably follow, in non-legal, non-judicial determinations for which it is not equipped by training or experience. . . . We believe that to embark upon such a course would be unwise."

This court is of the opinion that plaintiffs do not have standing to challenge the disciplinary procedures of the North Carolina prison system. It has already been held that those claims were improperly raised by the class action, and the plaintiffs individually make no allegations whatsoever that they have ever been subjected in any way to prison disciplinary sanctions, or that they are about to be subjected to such sanctions.

The complaint is without merit. Now, therefore,

It is ORDERED that the complaint be and is hereby dismissed.

It is further ORDERED for purposes of the record only, that plaintiffs be allowed to file their complaint with the clerk of this court without prepayment of the fees, costs, or security therefor.

This 30th day of April 1973.

Algernon L. Butler
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U. S.
FILED
MAY 16 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1287

ROBERT WEINSTEIN et al.,

Petitioners

v.

HOWARD E. BRADFORD et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Counsel for Respondents

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Respondents filed suit under the Civil Rights Act, 42 U.S.C. 1983, alleging that they were eligible to be considered for parole but had been denied parole by the State authorities following the conduct of proceedings that failed to meet minimal standards of due process. As noted by the court of appeals (Pet. App. 11), their complaint alleged that the Parole Board failed to accord them a hearing, failed to give them notice of the nature and tenor of, or opportunity to comment on, adverse information upon which the Board subsequently relied, and failed to advise them of the reasons for denial of parole. Without determining the truth of these allegations, the district court had dismissed the complaint on the ground that the Due Process Clause has no application to "procedures designed to determine suitability for parole" (Pet. App. 11).

Observing that the question presented on appeal was "not the right to parole but the right to procedural due process in the consideration of parole" (Pet. App. 12), the court of appeals found "no difficulty in concluding that the due process clause has some application" (Pet. App. 13; emphasis in original) to parole eligibility proceedings. Noting, however, that respondents' allegations of arbitrary procedure had not been proved, the court refrained from deciding what minimal standards of due process might require in the setting of parole eligibility proceedings (Pet. App. 16) and remanded the cause for a determination of the underlying facts. The court below also ruled that suit had properly been brought under 42 U.S.C. 1983.*

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* A companion case filed by South Carolina prisoners similarly claiming a right to procedural due process in the conduct of parole eligibility determinations was consolidated with the instant case in the court of appeals and likewise remanded for an evidentiary hearing on the plaintiffs' allegations of unfairness. The members of the South Carolina Parole Board have not sought review in this Court.

We oppose grant of this Court's writ for the following reasons. First, contrary to petitioners' suggestion, 42 U.S.C. 1983 clearly provides jurisdictional basis for consideration of respondents' claim. Preiser v. Rodriguez, 411 U.S. 475, holding that a prisoner must proceed by habeas corpus (first exhausting state remedies) when he claims a right to release on parole does not govern when a prisoner claims merely that he has a right to have his eligibility for parole considered in accordance with constitutionally acceptable procedures. There is an independent ground, not reached by the court of appeals, for holding that the exercise of federal jurisdiction was appropriate: North Carolina's post-conviction remedies provide no avenue by which a prisoner may challenge the manner in which the State parole system operates. Secondly, we submit that the court of appeals' opinions upon which petitioners rely in asserting that there is an inter-circuit conflict on the question of the applicability of the Due Process Clause to parole eligibility proceedings cannot be considered viable precedents when read against this Court's opinions in Morrissey v. Brewer, 408 U.S. 471; Gagnon v. Scarpelli, 411 U.S. 778; and Wolff v. McDonnell, 418 U.S. 539. This is not only the thrust of the decision below. Precisely the same view has been recently expressed in decisions of the District of Columbia and Second Circuits to which petitioners make no reference. Thirdly, in no

event does it appear that the instant case, involving as it does a ruling of a purely interlocutory character, presents an appropriate vehicle for this Court's review.

1. In Preiser v. Rodriguez, 411 U.S. 475, 482, this Court held that "where state prisoners have challenged the actual duration of their confinement on the ground that they have been unconstitutionally deprived of good conduct time credits, and where restoration of those credits would result in their immediate release from prison or in shortening the length of their confinement . . . [the] state prisoner . . . is limited to the specific remedy of habeas corpus. . . ."* Such an effort "to secure relief from illegal custody" (p. 484) is to be sharply differentiated, the Court made plain, from "a constitutional challenge to the conditions of . . . prison life" (p. 499). Claims of the latter description are remediable under 42 U.S.C. §1983 (ibid). According to Preiser, then, habeas corpus is to be deemed the exclusive remedy if, but only if, (1) the state prisoner is "challenging the very fact or duration of his physical confinement" (ibid) and (2) the relief sought is "a determination that he is entitled to immediate release or a speedier release from imprisonment" (p. 500).

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* There is of course no question that the terms of Section 1983 broadly comprehend "the deprivation" by one acting under color of state law, "of any rights, privileges or immunities secured by the Constitution. . . ." The basis of the Preiser decision was that the broad language of Section 1983 was not conclusive in the situation there presented because the specific federal habeas statute was "explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement. . ." (411 U.S. at 489). If the Preiser rationale is inapplicable to the case at bar, it seems indisputable, therefore, that appellants' claim is properly asserted under Section 1983.

In the instant case, as the court below noted, respondents make no "claim that they have a right to parole so that they would be released prior to the full service of their sentences" (Pet. App. 12): their sole claim is that they have a "right to procedural due process on consideration of parole" (ibid). Neither the legality of their confinement nor its duration is in issue. The situation is thus indistinguishable from that in Wolff v. McDonnell, 418 U.S. 539, 555, a suit under 42 U.S. 1983 in which this Court sustained the authority of the lower federal courts "to determine the validity of the procedures for revoking goodtime credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already cancelled."

Although there is no need to go further, we point out additionally that even if habeas corpus were deemed to be the appropriate remedy in this case, there would be no defect for failure to exhaust State procedures. Apart from those provisions permitting an attack on the fairness of the proceedings which resulted in conviction, on the jurisdiction of the sentencing court and on the legality of the sentence (none of which are applicable here), the post-conviction statute (1 C Gen. Stat. N.Car. § 15-217 et seq. (1971 Cum. Supp.)), preserves the remedy of habeas corpus to the extent that it was previously available. However, the North Carolina

habeas corpus statute requires that an application "to prosecute the writ . . . be denied . . . where persons are committed or detained by virtue of a final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction" (1 C G. S. IV C. § 17-4(a). Since respondents do not question the legality of their convictions or sentences, but only the procedures employed by the Parole Board, they have no available State post-conviction remedy or other avenue for seeking relief in the State system.

2. The decision below, rejecting the view that the due process clause is wholly inapplicable to the procedures employed to determine suitability for parole, is plainly correct. A lengthening series of decisions of this Court makes it clear that none of the catch-phrases formerly employed to support a total denial of due process applicability will any longer pass muster. Due process protection has been applied to many types of proceedings occurring subsequent to a conviction — judicial sentencing, Mempha v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948); revocation of probation, Mempha, supra, and Gagnon v. Scarpelli, 411 U.S. 778 (1973); revocation of parole, Morrissey v. Brewer, 408 U.S. 471 (1972); prison disciplinary proceedings, Wolff v. McDonnell, 418 U.S. 539 (1974) — and it no longer suffices to say that an interest does not merit constitutional protection because it is a "privilege" rather than a "right." Mr. Justice Stewart made the matter clear,

writing for the Court in Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972): "This Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges" that once seemed to govern the application of procedural due process rights." Nor is it controlling that a prisoner has only an "expectancy," and no immediate "right," to parole. The cases cited by the court below (Pet. App. 15 n.3) plainly establish that due process embraces the opportunity to secure a fair determination of a claim even though the claim is inchoate. Differences in the immediacy of the interest do not determine the basic question of whether the due process claim applies; "such differences are material only in determining the context of due process in the particular situation." Hart and Wechsler, The Federal Courts and the Federal System 353 (2nd ed. 1973).

North Carolina law is designed to assure a prisoner that the possibility of conditional freedom will receive serious consideration. North Carolina Gen. Stat. Ann. §148-58 (1964), while providing that parole is not mandatory for any prisoner, is careful to state explicitly that prisoners "shall be eligible to have their cases considered for parole" when the statutorily directed portion of their particular sentence expires, and that a section setting parole eligibility dates "shall be construed as only guaranteeing to every prisoner a review and consideration of his case upon its

merits" (italics supplied). This guarantee of consideration is not merely a pro forma exercise: Of all inmates who left the state's prisons in 1964, over 40% were released on parole.* Thus, appellants are given a statutory promise of the most serious consideration for parole, along with a most substantial chance that their application will be successful.

Indeed, petitioners base nearly their entire case for review by this Court not on the merits of the issue under the decisions of this Court,** but on the asserted existence of a conflict between the decision below and that of other Courts of Appeals (Pet. 4). The fact, however, is that the cases cited were decided before all or some of the Court's decisions in Morrissey v. Brewer, Gagnon v. Scarpelli, and Wolff v. McDonnell, supra. The court below is not alone in noting (Pet. App. 16) the effect of these decisions on the issue. The Courts of Appeals for both the District of Columbia and the Second Circuits have squarely joined the Fourth Circuit in rejecting the position urged by petitioners, United States ex rel. Johnson v. Chairman, 500 F.2d 925 (C.A. 2); Childs v.

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* See the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 61 (1967). The Report points out that "more than 60% of adult felons for the nation as a whole are released on parole prior to the expiration of their maximum sentence" Id. at 60.

** It is plain that the petitioners' brief reference to the "serious problems affecting the structure of criminal justice" raised by the decision below speaks to a matter appropriately to be weighed, as the court below recognized (Pet. App. 16), in determining the content of due process protection in this field, not its applicability.

United States Board of Parole, F.2d (C.A.D.C., No. 74-1052, December 19, 1974),* and in specifically adverting to the effect of the Morrissey-Scarpelli-McDonnell trilogy. Indeed, Johnson was written by Judge Mansfield, the author of one of the cases (Menechino v. Oswald, supra) on which petitioners still seek to rely. Beyond that, as Johnson says with respect to the Menechino precedent (500 F.2d at 926), the decisions said to produce a conflict within the circuits all were decided in response to contentions that applicants for parole are entitled to counsel at parole-release hearings, or to a "whole gamut" (ibid) of trial-type protections, which respondents herein have not sought. In short, the asserted conflict is of just the kind to which Mr. Justice Harlan referred, as not requiring Supreme Court review, when he spoke of situations "where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals." Harlan, Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Austr. L.J. 108, 112 (1959).

3. Respondents submit that the decision below is an inapt vehicle for reviewing the broad issue posed by petitioners because it is interlocutory and wholly abstract. The record below consists entirely of the complaint and a motion to dismiss.

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* Although the time for petitioning in Childs, as extended, has not expired, we are advised that the Solicitor General does not propose to apply for the writ.

There is no answer to respondents' allegations regarding the actual operation of the North Carolina parole system, nor any discovery. For this reason, the court below declined wholly to say "how much process is 'due'" (Pet. App. 16). In these circumstances, the issue sought to be posed here by the petition, even if deemed to warrant consideration by this Court, should be examined on the basis of a final judgment, rendered on a full record and calling forth consideration of the entire due-process issue by the court below. This petition is not the appropriate vehicle for such an examination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Ralph S. Spritzer

Howard Lesnick

Counsel for Respondents

May, 1975

BEST COPY AVAILABLE

Supreme Court, U. S.
FILED
JUL 22 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 74-1287

ROBERT WEINSTEIN, et al.,

Petitioners

v.

HOWARD E. BRADFORD, et al.,

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit filed November 22, 1974 is not yet reported and is printed as Appendix A in the Petition for Writ of Certiorari filed herein on April 14, 1975 (P pp 9-25).

The Order of the Fourth Circuit Court of Appeals filed January 15, 1975 denying the Petition for Rehearing and Motion for Rehearing En Banc is printed as Appendix B in the Petition for Writ of Certiorari filed herein on April 14, 1975 (P pp 26-28).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Petition for a Writ of Certiorari was granted June 2, 1975.

QUESTIONS PRESENTED

I. WHETHER PREISER v. RODRIGUEZ, 411 U.S. 475 (1973) PRECLUDES AN ACTION UNDER 42 U.S.C. § 1983 CLAIMING THE APPLICABILITY OF DUE PROCESS IN PAROLE CONSIDERATION.

II. WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS APPLICABLE TO THE PROCEDURES FOLLOWED BY A PAROLE COMMISSION IN DETERMINING WHETHER OR NOT A CORRECTIONAL INSTITUTION INMATE IS SUITED FOR PAROLE RELEASE.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Howard E. Bradford and Robert E. Harris are North Carolina State Court prisoners who had been denied parole by the North Carolina Board of Paroles. With the assistance of a "penitentiary lawyer", they filed a civil rights complaint dated March 2, 1973 challenging disciplinary procedures of the North Carolina Department of Correction, indeterminate procedures of the North Carolina Department of Correction, and the parole granting and revoking procedures of the North Carolina Board of Paroles. (A pp 2-16). On May 1, 1973, without requiring an answer from the Defendants, the District Court dismissed the Complaint. BRADFORD v. WEINSTEIN, 357 F. Supp. 1127 (E.D.N.C. 1973) (A pp 17-25).

Howard E. Bradford appealed the dismissal to the United States Court of Appeals for the Fourth Circuit which, in a two-to-one decision, reversed the District Court and held that due process is required in parole consideration and that inmates

may attack the denial of due process in a suit brought pursuant to 42 U.S.C. § 1983 (P pp 9-25). The Appellees moved for rehearing and rehearing en banc. The Court voted four-to-four on Appellees' Motion to Rehear and the Motion was therefore denied (P pp 26-28).[1]

On April 14, 1975, the Petitioners filed a Petition for Writ of Certiorari in this Court to review the Opinion of the Fourth Circuit Court of Appeals and on June 2, 1975, the Petition for Writ of Certiorari was granted.

ARGUMENT

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENTERTAIN THIS ACTION SINCE THE ACTION IS IN THE NATURE OF A PETITION FOR HABEAS CORPUS AND RESPONDENTS HAVE AN AVAILABLE STATE REMEDY.

It is Petitioners' contention that the Complaint filed in the District Court should be treated as a petition for writ of habeas corpus under 28 U.S.C. § 2254, rather than as a civil rights action under 42 U.S.C. § 1983, since it challenges the fact of physical confinement and seeks as relief a more speedy release from imprisonment. If Petitioners are correct in their construction of PREISER v. RODRIGUEZ, 411 U.S. 475 (1973), then the District Court lacked jurisdiction over the Respondents' action for the reason that the Respondents failed to exhaust available state remedies prior to seeking federal relief. In PREISER this Court stated that:

> ". . . when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate

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1. It is interesting to note that in the Order denying rehearing, all four judges who voted in favor of the rehearing noted their dissent on the merits from the panel decision. Thus, by the luck of the draw, the Opinion of the District Court was reversed rather than affirmed.

or more speedy release from that imprisonment, his sole federal remedy is a writ of habeas corpus . . ." Id. at 500.

Although Respondents are not seeking immediate release, if the relief requested by their Complaint is granted it will be necessary for Petitioners to forthwith afford the Respondents and all those similarly situated with an otherwise unnecessary review under revised parole consideration procedures. While it is true that these new hearings would not invariably result in any inmates being immediately released from confinement, the fact that these otherwise unavailable opportunities for release would be the end result of the relief the Respondents seek is sufficient to bring this case within the meaning of PREISER, because ". . . recent cases have established that habeas corpus relief is not limited to immediate release from illegal custody, but that the writ is available as well to attack future confinement and to obtain future releases." 411 U.S. at 487 quoted in BASKINS v. MOORE, 362 F. Supp. 187 (S.C. 1973) at 189.

If PREISER requires that the Respondents' Complaint be treated as a petition for habeas corpus, Respondents do not have a claim for relief cognizable in federal court, since a state remedy adequate to secure the relief herein requested is available to them under JERNIGAN v. NORTH CAROLINA, 279 N.C. 556, 184 S.E. 2d 259 (1971). In JERNIGAN the Supreme Court of North Carolina was confronted with the question of whether or not there exists a procedure by which an inmate could attack an Order of the North Carolina Board of Paroles entered pursuant to the authority of N.C.G.S. 148-62 requiring that he serve the remainder of the sentence upon which he had been paroled after the completion of a new sentence imposed while he had been free on parole. Justice Sharp (now Chief Justice) in writing for the Court, found that neither the North Carolina Post Conviction Hearing Act, N.C.G.S. 15-217, nor N.C.G.S. 17-1, the North Carolina Habeas Corpus statute, provided an appropriate basis for review in the circumstances of the case. However, Justice Sharp found jurisdiction to "treat

this proceeding as one instituted under the Declaratory Judgment Act. For the reasons hereinafter set out we deem this Act to provide an appropriate means of deciding this case." JERNIGAN v. STATE, supra, at p. 560.

> "The Declaratory Judgment Act (G.S. 1-253 through G.S. 1-267) provides that '[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.' G. S. 1-254. To that end the courts of record are 'empowered to declare rights, status, and other legal relations, whether or not further relief is or could be claimed.' G. S. 1-253.
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> * * *
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> "The courts do not lack power to grant a declaratory judgment merely because a questioned statute relates to penal matters. When a plaintiff has a property interest which may be adversely affected by the enforcement of the criminal statute, he may maintain an action under the Declaratory Judgment Act to determine the validity of the statute in protection of his property rights . . ."

In VANILLA v. MORAN, 67 N.Y.S. 2d 833, aff'd 272 App. Div. 859, 70 N.Y.S. 2d 631, appeal denied 272 App. Div. 971, 72 N.Y.S. 2d 420, appeal dismissed 297 N.Y. 593, 75 N.E. 2d 265, aff'd, 298 N.Y. 796, 83 N.E. 2d 696 (1949), and in KOYCE v. UNITED STATES BOARD OF PAROLE, 306 F. 2d 759 (D.C. Cir. 1962), similar results were also reached.

If PREISER requires that Respondents' Complaint be treated as a Petition for Habeas Corpus, Respondents do not have a claim for relief cognizable in a federal court, since they have available to them an effective state remedy and therefore all remedies "available in the courts of the state" have not been exhausted. 28 U.S.C. § 2254.

II.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT EXTEND SO FAR AS TO REGULATE THE PROCEDURES FOLLOWED BY A PAROLE COMMISSION IN DETERMINING WHETHER OR NOT A CORRECTIONAL INSTITUTION INMATE IS SUITED FOR PAROLE RELEASE.

The Respondents in this case present a broadfront challenge to North Carolina parole procedures contending that the various grounds for relief assigned by them in the Complaint in the District Court (A pp 2-16) represent violations of their rights under the Equal Protection Clause of the Fourteenth Amendment. However, the basic issue is whether the Constitution mandates the procedural due process demanded by the Respondents. In resolving this issue, it is necessary to recognize that a fundamental condition for requiring constitutional (as distinguished from statutory) due process is the existence of governmental action which threatens to destroy or impair an existing private interest. Usually such action is accomplished through an adversary proceeding in which a vital issue of fact is resolved against a person without according him the benefit of certain fundamental safeguards. The Fourteenth Amendment requires the safeguards of due process to be applied only where the state is attempting to deprive a citizen of "life, liberty or property". The procedural requirements of the due process clauses do not attach themselves to "every conceivable case of government impairment of private interest". CAFETERIA AND RESTAURANT WORKERS v. McELROY, 367 U.S. 886, 894 (1961). The interest to be protected must be one of constitutional magnitude. This Honorable Court has held that the issue of whether a litigated interest is of such magnitude as to be protected by the Fourteenth Amendment is wholly dependent upon a determination of the extent to which a citizen "will be condemned to suffer a grievous loss" as a result of an unfavorable decision in the proceeding. JOINT

ANTI-FASCIST REFUGEE COMMITTEE v. McGRATH, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in GOLDBERG v. KELLY, 397 U.S. 254, 263 (1970); also in MORRISSEY v. BREWER, 408 U.S. 471, 481 (1972).

A "grievous loss" activating due process procedures was found where welfare benefits were stopped, GOLDBERG v. KELLY, supra; where wages were garnisheed, SNIADACH v. FAMILY FINANCE CORP. 395 U.S. 337 (1969); where driver's license was revoked, BELL v. BURSON, 402 U.S. 535 (1971); where unemployment compensation was withheld, SHERBERT v. VERNER, 374 U.S. 398 (1963); where an employee holding a government created job was fired, BOARD OF REGENTS v. ROTH, 408 U.S. 564 (1972); and where an individual's parole or probation was revoked, MORRISSEY v. BREWER, supra; GAGNON v. SCARPELLI, 411 U.S. 778 (1973). In each of the examples above, a vital interest upon which the individual had come to rely, be it welfare payments, a driver's license, a job, or conditional liberty, had been deprived, revoked, terminated or taken away without the benefit of the constitutional protection of the due process clause. This Court justifably vetoed the arbitrary procedures that had been utilized in those cases.

In MORRISSEY v. BREWER, supra, this Court applied due process to parole revocation hearings, emphasizing that the benefits of gainful employment, the enjoyments of a family and social life, and "other endearing attachments of normal life", would be denied the parolee should he lose his parole. This Court also noted the reliance of a parolee upon "at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions." A revocation of conditional liberty obviously results in the loss of a freedom presently enjoyed by the paroled or probated—such a "grievous loss" that fundamental procedural safeguards must be implemented in fact finding hearings held in such cases.

However, the case at bar is clearly distinguishable from all

of the above instances. The interest which Respondents seek to have designated as constitutionally protected within the meaning of the Fourteenth Amendment "liberty" is nothing more than their hope for parole release. Respondents, in fact, have no liberty of which they are to be deprived or which is to be taken away; they suffer no loss of something upon which they have reasonably placed reliance. The Fifth Circuit Court of Appeals in a post-MORRISSEY decision held that an interest in parole release is not a right protected by the Fourteenth Amendment:

> "The emerging and underlying principle is clear; once a cognizable benefit is conferred or received, governmental action must not be employed to deprive or infringe upon that right without some form of prior hearing. We are unaware, however, of any authority for the proposition that the full panoply of due process protection attaches every time the government takes some action which confers a new status on the individual or denies a request for a different status.
>
> ". . . [Petitioner] Scarpa is a convicted felon currently incarcerated in prison for his past transgressions. This manifest deprivation of liberty is the result of a due process hearing. The sentencing judge mandated a possible confinement of eight years. Scarpa now attempts to equate the possibility of conditional freedom with the right to conditional freedom. We find such logic unacceptable.
>
> "If the Board refuses to grant parole, Scarpa has suffered no deprivations. He continues the sentence originally imposed by the Court . . ." SCARPA v. U. S. BOARD OF PAROLE, 477 F. 2d 278 at 282, vacated and remanded for consideration of mootness, 414 U.S. 809 (1973).

In MORRISSEY, 408 U.S. at 482, n. 8, it was recognized that there is a substantial difference in the importance of maintaining one's conditional liberty and the "mere anticipation or

hope of freedom." Therefore, it is quite evident that this Court did not equate conditional liberty with the hope of parole release.

In MENECHINO v. OSWALD, 430 F. 2d 403 (2nd Cir. 1970), cert. denied, 400 U.S. 1023 (1971), the Second Circuit Court of Appeals was faced with a contention by Menechino, a New York State prisoner, to the effect that he had a constitutionally protected right to procedural due process at a parole release hearing conducted by the New York State Board of Paroles. In MENECHINO, the Court of Appeals for the Second Circuit held that the prisoner is not entitled under the Fourteenth Amendment to procedural due process rights upon being considered by the New York State Board of Paroles for release on parole prior to termination of his court-imposed sentence.

> ". . . He is entitled only to be released after full service of his sentence less good time earned during incarceration. The Board is given absolute and exclusive discretion to decide whether or not to institute parole proceedings and, if so, whether parole should be granted to him. Appellant has been constitutionally deprived of his right to liberty for the period of his sentence. Unlike an alien seeking entry into the United States (as distinguished from a lawful resident alien), he does not qualify for procedural due process in seeking parole." (Citations omitted) MENECHINO v. OSWALD, supra, at pp. 408, 409.
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> "In the last analysis the Board's determination as to whether a prisoner is a good parole risk represents an aspect of state prison discipline, not an adjudication of rights in an adversary proceeding . . ." MENECHINO v. OSWALD, supra, at p. 412.

As the District Court in BARRADALE v. UNITED STATES BOARD OF PAROLES & PARDONS, 362 F. Supp. 338 (M.D. Penn. 1973), pointed out:

> ". . . the interest which plaintiff has in being released on parole is not one which he is presently enjoying. Unlike a parole revocation hearing where one's continued liberty is at stake, . . . a prisoner applying for parole has no right to be released until he has served his full term less his good time credits. Whether he will be released on parole prior to the expiration of his sentence is wholly within the discretion of the Board." *Id.* at 341.

In that case, as in the present one, there is no threat to an "existing private interest".

The Fourth Circuit relies upon WOLFF v. McDONNELL, 418 U.S. 530 (1974) in support of its conclusion that parole release consideration requires an application of the Fourteenth Amendment. However, in ruling that prison disciplinary proceedings are subject to basic procedural requirements due to the possibility of revocation of good time credit, this Court relied heavily upon the Nebraska Revised Statutes, § 83-1, 107 (Supp. 1972), providing for the allowance and reduction of good time. This Court stated:

> ". . . the State itself has not only provided a statutory right to good time credit but also specifies that it is to be forfeited only for serious misbehavior . . . The State itself having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the State created right is not arbitrarily abrogated. . . ." *Id.* at 557.

Thus, WOLFF is merely another instance in which this Court has required due process where the individual is to be *deprived* of something substantial, i.e., good time credit, guaranteed to him by a state statute. It is inappropriate

where, as here, no vested or absolute right is extended and then withdrawn.

The State of North Carolina does not grant the inmate a right to parole, but grants the Parole Commission the discretion to release an inmate on parole. N.C.G.S. 148-58 and N.C. G.S. 148-60. N.C.G.S. 148-58 provides:

> "All prisoners shall be eligible to have their cases considered for parole when they have served a fourth of their sentence, if their sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate; provided, that any prisoner serving sentence for life shall be eligible for such consideration when he has served 20 years of his sentence. Nothing in this section shall be construed as making mandatory the release of any prisoner on parole, but shall be construed as only guaranteeing to every prisoner a review and consideration of his case upon its merits."

N.C.G.S. 148-60 provides:

> "The time of releasing each prisoner eligible for consideration for parole as provided for herein shall be discretionary, and due consideration shall be given to the reasonable probability that the prisoner will live and remain in liberty without violating the law; that the release of the prisoner is not incompatible with the welfare of society, and that the record of the prisoner during his confinement established that the prisoner is obedient to prison rules and regulations, and has shown the proper respect for prison officials, and due regard and consideration for his fellow prisoners; and that the prisoner harbors no resentment against society, or the judge, prosecuting attorneys, or jury that convicted the prisoner."

It is clear that before the Parole Commission can grant a parole under N.C.G.S. 148-60, the Commission must, in its discretion determine "the reasonable probability that the

prisoner will live and remain in liberty without violating the law [and] that the release of the prisoner is not incompatible with the welfare of society. . . ." All that an inmate has at any time before this determination is made is a mere anticipation of parole release. Such an anticipation is not an interest of "real substance within the meaning of the Fourteenth Amendment.

In TARLTON v. CLARK, 441 F. 2d 384 (5th Cir. 1971), cert. denied, 403 U.S. 934 (1971), the Fifth Circuit Court of Appeals stated:

> "By the language of Title 18 U.S.C.A. § 4203, the Board of Parole is given absolute discretion in matters of parole. The Courts are without power to grant a parole. UNITED STATES v. FREDERICK, 405 F. 2d 129 (3rd Cir. 1968). Furthermore, it is not the function of the courts to review the discretion of the Board in the denial of application for parole or to review the credibility of reports and information received by the Board in making its determination." 441 F. 2d 385.

This position was reaffirmed by the Fifth Circuit Court of Appeals in SCARPA v. U. S. BOARD OF PAROLE, supra, and by the Fourth Circuit Court of Appeals in U. S. BOARD OF PAROLE v. MERHIGE, 487 F. 2d 25 (4th Cir. 1973). In U. S. BOARD OF PAROLE, supra, the Fourth Circuit notes that, "In adhering to its prior position, the Fifth Circuit was in accord with the clear weight of authority", citing BUCHANAN v. CLARK, 446 F. 2d 1379 (5th Cir. 1971), cert. denied, 404 U.S. 979 (1971); THOMPKINS v. U. S. BOARD OF PAROLE, 427 F. 2d 222 (5th Cir. 1970); BREST v. CICCONE, 371 F. 2d 981 (8th Cir. 1967); CAGLE v. HARRIS, 349 F. 2d 404 (8th Cir. 1965). "We also note that this Court [the Fourth Circuit] gave short shrift to a case of similar nature in BOZELL v. UNITED STATES, 199 F. 2d 449 (4th Cir. 1952)." U. S. BOARD OF PAROLE v. MERHIGE, supra. In CREASON v. NORTH CAROLINA BOARD OF PAROLES, ... F. 2d .... (4th Cir., June 3, 1975), the Fourth Circuit once

again reaffirms this position by stating that, "No prisoner in North Carolina has an absolute right to parole. GOBLE v. BOUNDS, 281 N.C. 307, 188 S.E. 2d 347 (1972). By statute, the right to be released on parole is discretionary. N.C.G.S. 148-60." The Court also reexpressed the view that " 'It is not the function of the Courts to review the discretion of [Parole Boards] in the denial of application for parole or to review the credibility of reports and information received by the [Parole Boards] in making [their] determination[s]'. UNITED STATES BOARD OF PAROLE v. MERHIGE, 487 F. 2d 25, 29 (4th Cir. 1973), quoting TARLTON v. CLARK, 441 F. 2d 384, 385 (5th Cir. 1971). We adhere to that position in this case."

The foregoing cases recognize the unique discretion committed to the United States Board of Parole under 18 U.S.C. § 4203[2], a statutory procedure similar in intent to N.C.G.S. 148-60.[3]

In SCARPA v. U. S. BOARD OF PAROLE, supra, the Fifth Circuit Court of Appeals clearly states the criteria applicable to parole consideration:

> "Many factors are necessarily involved in such determinations. The Board's final determination may be based on any or all the following: (1) length and seriousness of prior criminal record; (2) family history; (3) marital situation; (4) vocational and professional skills; (5) education; (6) physical conditions; (7) living habits in a free community; (8) behavior and progress while incarcerated. The Board possesses the expertise and experience for ascertain-

---

2. 18 U.S.C. § 4203 reads in pertinent part:
"(a) If it appears to the Board of Parole from report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board release is not incompatible with the welfare of society, the Board may in its discretion authorize release of such prisoner on parole.

3. Supra at 11.

ing which factors are determinative from the unique situation presented by each applicant.

* * *

"Two underlying criteria guide the Board in its decision-making process. First, whether there is a reasonable possibility that the prospective parolee will remain at liberty without violating the law, and second, will such release be compatible with the welfare of society."

Just as a district court has no authority to order parole, GODOY v. U. S. BOARD OF PAROLE, 345 F. Supp. 1292 (C.D. Cal. 1972); UNITED STATES v. SUTTON, 346 F. Supp. 464 (D.C.D.C. 1972) — a federal court cannot interfere with the administration of the parole law unless the body administering it has acted arbitrarily or capriciously. PEOPLE OF THE UNITED STATES ex rel HARRIS v. RAGEN, 81 F. Supp. 608 (N.D. Ill. 1949), aff'd, 177 F. 2d 303 (7th Cir. 1949). As a matter of legislative grace, not constitutionally mandated, parole from a state conviction is neither federally required or protected. SWEETEN v. SNEDDON, 463 F. 2d 713 (10th Cir. 1972); MENECHINO v. OSWALD, supra.

III.

THE VERY NATURE OF THE PAROLE GRANTING PROCESS NEGATES THE REQUIREMENTS OF DUE PROCESS.

It has been well established that:

". . . due process is flexible and calls for such procedural protection as the particular situation demands. 'Consideration of what procedural due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by government action.'" CAFETERIA AND RESTAURANT WORKERS UNION v. McELROY, 367

U.S. 886, 895, as quoted by MORRISSEY v. BREWER, 408 U.S. 481.

Therefore, it is necessary to determine the precise nature of the Parole Commission's function. In HYSER v. REED, 318 F. 2d 225 (D.C. Cir. 1963), cert. denied. sub nom. THOMPSON v. UNITED STATES BOARD OF PAROLE, 375 U.S. 957 (1963), Judge (now Chief Justice) Burger stated for the Court sitting *en banc* that:

"The Bureau of Prisons and the Parole Board operate from the basic premise that prisoners placed in their custody are to be rehabilitated and returned to useful lives as soon as in the Board's judgment that transition can be safely made. This is plainly what Congress intends. Thus, there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of *parens patriae* . . .

* * *

"Fundamentally the Parole Board's interest and its objective are to release a prisoner as soon as he is a good parole risk and to allow him to remain at liberty under . . . supervision as long as he is a good risk. . . ."

Before releasing an inmate and allowing him to reenter society, the Parole Commission has the awesome responsibility of deciding that this convicted felon has been rehabilitated to the extent that there is a "reasonable probability that the prisoner will live and remain in liberty without violating the law [and] that the release of the prisoner is not incompatible with the welfare of society. . . ." N.C.G.S. 148-60. This task

requires the Parole Commission to make a reasonable prediction concerning the inmate's future performance and abilities, as well as his readiness to be able to accept the responsibilities and accompanying strains in his attempts to readjust in the free community.

The Commission's concern is for the individual as well as for the safety of the community and the welfare of society. The Commission must determine that the inmate is sufficiently equipped to meet the demands of society on his own. It is imperative that the dual duties of the Commission be kept in mind in prescribing the procedural requirements which it is to follow in order to insure that the Commission is not frustrated in its attempt to make the best decision for the state and for the individual.

Petitioners believe that the present procedures of the North Carolina Parole Commission are constitutionally sufficient.[4]

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4. All 13,000 inmates in the custody of the Division of Prisons of the North Carolina Department of Correction are considered for parole when first eligible under N.C.G.S. 148-58 and, if parole is denied, are reconsidered at least annually thereafter.

Ninety days prior to the inmate's first parole eligibility date or on the next scheduled review date, the inmate's file is pulled and carefully studied by a case analyst. Based upon what the analyst finds in the file, the inmate will be recommended to the Commission for either parole denial or a preparole investigation.

If parole denial is recommended, the case comes before the Commission on what is known as the "case review" form which contains the reasons for the analyst's recommendation. The overwhelming majority of parole denial comes under "case review" because the files contain information that make it obvious that the inmate will not qualify for a parole at this point. For instance, the inmate may have a detainer against him and is awaiting trial on another charge. He may be on escape or a recently recaptured escapee; he may have several prison rules infractions that make him unqualified for parole under N.C.G.S. 148-60 or he may have a long prior criminal record which is such that the Commission is unable to conclude that there is a reasonable probability he will live and remain in liberty without violating the law.

If, during the case review, the analyst or any one Commissioner (out of a total of five) feels the inmate's case merits further investigation, a preparole investigation is ordered. At this point, an interview with one Commissioner is scheduled. Each week one Commissioner conducts these interviews at various prison units about the State. If a Commissioner, following an interview, recommends against parole, the case is presented to the full Commission and, if three Commissioners approve, the investigation is suspended, the inmate is denied parole, and a new review date is scheduled. If the interviewing Commissioner tentatively recommends parole, or any other Commissioner directs, the investigation is continued and, once this is completed, the case is presented to the full Commission for a vote.

At any time parole is denied, the inmate is notified in writing and is advised the reasons for denial. Where appropriate, the inmate receives suggestions to enhance parole probability at his next review. If the inmate, or any other interested person, questions the facts upon which denial is based, and an inquiry supports such contentions, the Commission will reconsider the inmate's case.

At any rate, Petitioners contend that the present procedures are far more appropriate to the non-accusatory parole granting function than is the type of adversary procedural format demanded by the Respondents.

In BRADFORD v. WEINSTEIN, supra, the District Court stated:

> "[A] parole revocation proceeding differs from a review by a Parole Board to determine whether an inmate should be paroled initially. In the former proceeding, the determination is whether the conditional freedom of the parolee should be terminated because of an allegal violation of the conditions of his parole. In a review to decide whether parole should be granted, the determination is whether an inmate is a suitable prospect for return to society." *Id.* at 1131.

The nature of Parole Board hearings was also explained in MENECHINO v. OSWALD, supra, in which the Second Circuit Court of Appeals refused to extend the full panoply of due process rights in such cases.

> "It [the Board] must consider many factors of a non-legal nature, such as psychiatric reports with respect to the prisoner, his mental and moral attitudes, his vocational education and training, the manner in which he has used his recreation time, his physical and mental health, his in-

tra-personal relations with prison staff and other inmates, his habits and the nature and extent of community resources that will be available to him upon his release, including the environment to which he plans to return." *Id.* at 408.

In summary, Petitioners submit that the Due Process Clause should not read as requiring the North Carolina Parole Commission to extend to inmates procedural safeguards so extensive that the Commission would be prevented from weighing all the tangible and intangible factors which the Commission must consider in order to make a reasonable prediction as to the inmate's suitability for parole. The procedures must allow the Commission to perform its delicate predictive task without being hampered by unreasonably burdensome forms of practice. The procedural format which Respondents claim to be their due would needlessly impede the efficient operation of the North Carolina Parole Commission.

". . . The administrative burden of the parole system would be enormously increased if each inmate were given a plenary hearing on his suitability for parole. Further burdens would ensue with requirements of notice, procedures for the appointment of counsel and reporters, subpoeaning and cross-examination of witnesses, compensation of counsel and cost of transcripts, and the preparation of findings and conclusions by the Board. Such requirements would likely result in congested dockets before the Board of Paroles and result in undue delay in reviewing the individual cases of 10,000 prisoners in the system as each becomes eligible for parole consideration. The state is not constitutionally required to provide for the parole of prisoners, and if the plaintiff's demands were enforced, and the burden of the prison system became too great, the State might find it necessary or desirable to terminate the parole system." BRADFORD v. WEINSTEIN, supra, at p. 1132.

CONCLUSION

For the foregoing reasons we respectfully submit that this case should be reversed and remanded to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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FILED
OCT 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1287

ROBERT WEINSTEIN, *et al.*,

Petitioners,

v.

HOWARD E. BRADFORD

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

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Petitioners,

v.

HOWARD E. BRADFORD

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT

The complaint herein was filed by respondent and another inmate of the North Carolina Department of Correction, acting with the assistance of another inmate but without legal counsel. It asserted the unconstitutionality, under the Due Process Clause of the Fourteenth Amendment, of the procedures followed by

the North Carolina Board of Paroles.[1] The allegations presently relevant are:

(1) Some inmates being considered for parole are not given a "hearing," i.e., an opportunity to appear in person in connection with consideration of their release on parole, and there are no sufficient criteria employed to determine whether or not a particular inmate will receive a hearing (Complaint, para. 2(c)(i), App. 4). Respondent was not given a hearing on any of the three occasions he was considered for parole (Complaint, paras. 8(a), (b), (c), App. 10).

(2) Inmates being considered for parole are not in any manner informed as to the factual and other data which the Board will consider in reaching its decision (Complaint, para. 2(c)(2), App. 4), and are therefore unable to refute "even the most demonstrably untrue information" (Complaint, para. 10(c)(iv), App. 12).

(3) Material is placed in an inmate's file "through a process which contains no substantial safeguards whatsoever" to insure reliability (Complaint, para. 10(c)(iii), App. 11-12). Board members base their decision on inaccurate and misleading information (Complaint, paras. 2(c)(7), 10(c)(i); App. 5, 11), and did so in respondent's case (Complaint, para. 8(d), App. 10).

(4) Hearings, when given, ordinarily take ten minutes or less, and decisions are made in less than five minutes (Complaint, para. 2(c)(5), App. 4-5). This is insufficient time to review the material, to interview the inmate, or

[1]A number of other issues were raised by the complaint, and ruled upon adversely by the District Court; they were not pursued on appeal, and are not referred to here.

to arrive at an informed decision (Complaint, para. 10(d), App. 12).

(5) Inmates financially unable to retain counsel are not afforded any representation (Complaint, para. 2(c)(4), App. 4).

(6) No written statement of the reasons for decisions, or the factual matters relied on, is provided to the inmate (Complaint, para. 2(c)(6), App. 5).

As a result of the foregoing, it was alleged, the decisions reached by the Board are based upon whim and caprice, and upon personal predilections or biases bearing no reasonable relation to the lawful discretion given the Board (Complaint, para. 10(e), App. 12).

In addition, respondent alleged that it was the practice of petitioner correctional authorities to require the submission of legal pleadings to them for photocopying prior to their being filed in court; that these copies were routinely included in the material made available to members or representatives of the Board of Paroles in connection with their consideration of inmates for release on parole; and that such material was often a significant factor in the decision to deny parole (Complaint, para. 2(c)(3), App. 4).

Respondent sought declaratory and injunctive relief designed to require modification of the procedures employed by the Board of Paroles in the respects asserted to be unconstitutional. No answer to the complaint was filed, and the District Court dismissed it on the merits, holding that "the Due Process Clause does not apply in procedures designed to determine suitability for parole" (App. 22). On respondent's appeal, the Court of Appeals appointed counsel for him, and reversed (Pet. 15), remanding the case for

factual proof and consideration of the scope of procedural protection required by the Due Process Clause (*id.* at 16). This decision was stayed pending disposition of a petition for certiorari, which was granted, __U.S.__, 95 Sup. Ct. 2394. The undersigned was appointed counsel for respondent, __U.S.__, 95 Sup. Ct. 2653.

SUMMARY OF ARGUMENT

A. The Court of Appeals correctly rejected the contention that jurisdiction over this suit under the Civil Rights Act of 1871 (42 U.S.C. §1983) is subject to the requirement of 28 U.S.C. §2254(b) that applicants for federal habeas corpus first exhaust State remedies. *Preiser v. Rodriguez*, 411 U.S. 475, which petitioners invoke here, reaffirmed a series of decisions holding that a §1983 action—specifically including one brought by prisoners against State correctional institutions—is not subject to an exhaustion requirement. It held that, where an inmate seeks "a determination that he is entitled to immediate release or a speedier release" (*id.* at 500), the "specific determination" (*id.* at 490) of Congress that habeas corpus relators first exhaust State remedies is implicated, regardless of the plaintiff's choice of jurisdictional base. Here, as in *Gerstein v. Pugh*, 420 U.S. 103, where *Rodriguez* was held inapplicable, the plaintiff is seeking *as relief* only a hearing, and may be released only if successful in a further administrative proceeding of problematic outcome. Moreover, even if applicable, 28 U.S.C. §2254(b) does not require exhaustion in this case, because under North Carolina law no State remedy is available or effective.

B. The Court of Appeals was also correct in rejecting the contention that the Due Process Clause of the Fourteenth Amendment is entirely inapplicable to the procedures employed to determine suitability for parole release. Petitioners' view, which has been rejected by a growing consensus of federal decisions, rests on a distortion of the realities of the parole system in the sentencing process, and a failure to recognize the flexibility and adaptability of the concept of due process as this Court has given it shape.

"[D]ue process is flexible and calls for such procedural protection as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481. There is thus no choice presented between exclusive legislative and exclusive judicial competence, no choice between the "full panoply" of procedural rights employed in a criminal trial and total denial of any due process protection.

Release on parole is neither "leniency" nor "clemency," but "an integral part of the penological system," *Morrissey v. Brewer*, 408 U.S. at 477. It is today the dominant mode of release from prison. The "hope" of parole release is not a merely unilateral expectation of the prisoner; it is an interest legitimated by the expectations of legislators and sentencing judges in designing and carrying out a sentencing system. In these circumstances, it is not controlling that respondent is not entitled to release. The differences which exist between denial of release and revocation of parole are relevant to the content of due process protection, but as to the nature of the prisoner's interest and the applicability of due process, the same interest is at stake in both cases: future controlled liberty or future imprisonment.

Nor does the discretionary and predictive quality of the suitability decision warrant denial of all due process protection. Because the decision reflects not simply the finding of facts, or the application to them of a few reasonably well-settled principles, certain protections typically associated with due process are inapt. But, as recent experience of the U.S. Board of Parole illustrates, descriptions of the process as entirely an unfathomable, essentially mystical one, lose sight of the overall reality. There are significant aspects of the matter to which due process protections are appropriately relevant. Both the State and the prisoner "have interests in the accurate finding of fact and the informed use of discretion." *Gagnon v. Scarpelli,* 411 U.S. 778, 785.

Predictions that minimum due process safeguards will place an unbearable administrative burden on the parole system are not, under the consistent theme of this Court's decisions, relevant to the issue of applicability of due process. Legitimate State interests are to be given weight in determining the content of due process protection.

C. Should this Court affirm, as respondent urges, the ruling of the Court below that due process applies to release proceedings, it will face the question whether to define its content in this case. Respondent submits that the minimum standards of procedural due process should include a right to appear in person before the Board, a member, or a hearing examiner; an opportunity to know and rebut factual information which may prompt an adverse decision; an opportunity to consult with available counsel in preparing for the hearing; and a right to a written statement of the reasons for an adverse decision. In light of the undeveloped state of

the present record and the fragmentary nature of present knowledge about the parole system and the competing interests involved, respondent suggests that the Court defer consideration of the questions whether the prisoner has a right to see the actual case file made available to the examiner, and to have counsel or supporting witnesses present at the hearing itself. Respondent does not contend that due process requires the State to present "evidence" through witnesses, or to accord the right to confrontation; nor is there a right to have counsel assigned.

ARGUMENT

I.

THE JURISDICTION OF THE DISTRICT COURT WAS NOT AFFECTED BY THE REQUIREMENT OF 28 U.S.C. § 2254(b) THAT APPLICANTS FOR FEDERAL HABEAS CORPUS FIRST EXHAUST STATE REMEDIES

A. The Exhaustion Requirement of 28 U.S.C. § 2254(b), As Construed in *Preiser v. Rodriguez,* Does Not Extend to a Suit Seeking Only to Affect the Procedure of Future Parole Hearings

Petitioners' attempt to stretch this Court's decision in *Preiser v. Rodriquez,* 411 U.S. 475, to govern this case was properly rejected by the Court of Appeals (Pet. 17-19). The opinion of Mr. Justice Stewart for the Court in *Rodriguez* espoused three propositions, all relevant to the question at bar:

First, the Court reaffirmed its earlier decisions (a line of cases beginning with Justice Frankfurter's opinion in *Monroe v. Pape*, 365 U.S. 167) holding that there is no judicial requirement of exhaustion of State remedies in suits under the Civil Rights Act of 1871, 42 U.S.C. §1983 (411 U.S. at 477).

Second, the Court similarly reaffirmed the principle that a §1983 action was available to State prisoners no less than to others complaining of unconstitutional conduct engaged in under color of State law, and that there was to be no general rule that the special problems of federal involvement in State prison administration warranted an exhaustion requirement in prisoner suits under §1983 (see 411 U.S. at 498-99).

Third, the Court held that a prisoner "challenging the very fact or duration of his physical imprisonment, and . . . [seeking] a determination that he is *entitled* to immediate release or a speedier release" (*id.* at 500; emphasis supplied), may not avoid the exhaustion requirement of the habeas corpus statute[2] by basing the action on §1983 instead. Where the action is "close to the core" of habeas corpus (*id.* at 489), the Court held, the "specific determination" of Congress (*id.* at 490) that habeas corpus relators first exhaust state judicial remedies must be respected regardless of the plaintiff's choice of jurisdictional base.

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[2]28 U.S.C. §2254(b) provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

Broad-ranging invocation of arguments addressed to "comity" and the avoidance of friction between State and federal authorities "in adjudicating the rights of State prisoners" (dissenting opinion below, Pet. 22), would cut *Rodriguez* loose from its careful grounding in "explicit congressional intent," 411 U.S. at 489, and convert the exhaustion requirement from a *legislative* one involving *habeas corpus* to a *judicial* one involving *State prisoners*. This is flatly inconsistent with *Rodriguez*; see *id.* at 492 n.10.[3]

Subsequent decisions support this analysis. In *Wolff v. McDonnell*, 418 U.S. 539, this Court held that *Rodriguez*, while barring an attack on the forefeiture of good-time credits by reason of allegedly unconstitutional disciplinary proceedings, did not require exhaustion as to an attempt to obtain "an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations." *Id.* at 555. In *Gerstein v. Pugh*, 420 U.S. 103, 107 n.6, *Rodriguez* was held inapplicable to a claim by arrestees that they were constitutionally entitled to a judicial determination of probable cause for pretrial detention.

> Respondents did not ask for release from state custody. . . . They asked only that the state authorities be ordered to give them a probable cause determination. . . . Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy.

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[3]In light of this evolution of the law, the fact that the exhaustion rule was originally judicially promulgated, *Ex parte Hawk*, 321 U.S. 114, does not legitimate judicial expansion of the rule beyond the habeas corpus area.

The foregoing passage from Mr. Justice Powell's opinion in *Pugh* is fully applicable to the challenge to parole procedures; indeed, with words such as "constitutionally adequate parole hearing" substituted for "probable cause determination," they describe this case. For in both cases, the ultimate motive for the prisoner's challenge is the desire to enhance the likelihood of future release. But that insight does not convert this proceeding into a "challenge to confinement" (Brief of California, *amicus curiae*, p. 3), and it is simply not true, as petitioners casually assert, that the complaint herein "challenges the fact of physical confinement and seeks *as relief* a more speedy release from imprisonment" (Br. 3; emphasis supplied). Where release is not merely to take place in the future (as in the situation referred to by petitioners, Br. 4), but is the result of a further determination, yet to be made and of problematic outcome, the habeas corpus remedy is not the exclusive one.[4] Like respondents in *McDonnell*,

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[4]Indeed, parole is an *a fortiori* case from pretrial detention, as in *Pugh*, because it is, to a far greater degree, a discretionary judgment.

Section 1983 applies even though perhaps "it is arguable," *Preiser v. Rodriguez*, 411 U.S. at 499, that habeas corpus may be available to attack unconstitutional parole-hearing procedures; see the discussion, *id.* at 499-500. And it is of course wholly irrelevant whether habeas corpus, rather than some other proceeding, is the *State* remedy available, as is asserted to be the case in California (Brief of California, *amicus curiae*, p. 2). In fact, moreover, California *habeas corpus* practice specifically recognizes the distinction between release from custody and relief against unconstitutional procedures, whether remedying them will lead to ultimate release or not. *E.g.*, *Ex Parte Bramble*, 31 Cal.2d 43, 53-54, 187 P.2d 411, 417 ("Since [petitioner]

respondent here seeks an injunction against future unconstitutional procedures. Like those in *Pugh*, he seeks a proper hearing. Like those respondents—and, we would suppose all or nearly all litigating prisoners—his motive is probably the desire to end or shorten his imprisonment. But where it cannot be said that respondent is using § 1983 as a device to avoid calling a habeas corpus action by its proper name, the legislative judgment requiring exhaustion is not at risk. That is all that *Rodriguez* sought to protect.

B. Section 2254(b), Even if It were Applicable, would Not Require Exhaustion in This Case, Because of the Applicability of the Exceptions Provided For Where State Remedies Are Unavailable or Ineffective

Section 2254(b), by its own terms, specifically provides that exhaustion is not required where "there is *either* an absence of available State corrective process *or* the existence of circumstances rendering such process

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has not been presently admitted to parole . . ., he is not entitled to an order . . . that he be released from custody, but it is his right to have a request for parole considered and determined by the Adult Authority in the regular course of its proceedings and in light of the law . . . as herein above declared"); *Application of Bartges*, 44 Cal.2d 241, 248, 282 P.2d 47, 51 ("the writ should be granted, not to discharge the petitioner from custody . . . but to discharge him from only the illegal circumstances of his restraint"; writ granted, prisoner remanded to custody of sheriff to be arraigned before the court for resentencing, including power in the court "in its discretion" to grant or deny probation); *Application of Chessman*, 44 Cal. 2d 1, 6, 279 P.2d 24, 27 ("the prisoner may be discharged from illegal conditions of restraint although not from all restraint").

ineffective to protect the rights of the prisoner" (emphasis supplied). Respondent argued below that both of these limitations on the exhaustion requirement applied. Ruling as it did that Section 2254(b) was inapplicable under *Rodriguez*, the Court of Appeals did not reach these contentions. Respondent has not abandoned them and briefly sets them forth here.[5]

As to availability, petitioners concede (Br. 4) that neither the North Carolina Post Conviction Hearing Act, No. Car. Gen. Stat. §15-217, nor the Habeas Corpus statute, No. Car. Gen. Stat. §17-1, reaches the claims raised here. They refer to *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259, as authorizing utilization of the Declaratory Judgement Act, No. Car. Gen. Stat. §1-253, in a suit against the Board of Paroles. But that case challenged the Board's interpretation of a statute dealing with the effect of parole revocation on the computation of future "prison time," and relied on the availability of declaratory judgments to "any person whose rights, status or other legal relations are affected *by a statute* . . . [to] have determined any question of construction or validity *under the . . . statute*. . . ." Gen. Stat. §1-254 (emphasis supplied). Applying that language, the Supreme Court of North Carolina held declaratory relief available "when a specific provision of

[5]Judge Bryan was in error in stating, in dissent below (Pet. 23), that "it is not questioned" that adequate and available state remedies exist. The State did indeed so assert, as he said, but those representations *were* disputed in respondent's brief below.

The dissent below was also in error in its reference to State administrative as well as judicial remedies (Pet. 23, 25). Section 2254(b) specifically speaks of remedies "available in the courts of the State. . . ."

a statute is challenged. . .," *id.* at , 184 S.E.2d at 264. The case now at bar, challenging only the procedures employed by the Board of Parolees, falls outside the plain language of the Declaratory Judgment Act, and the reach of the *Jernigan* opinion.

Even if it were jurisdictionally available, it is plain that in this case resort to State court would be "ineffective to protect" (28 U.S.C. §2254(b)) the constitutional rights here asserted. The Supreme Court of North Carolina has ruled as recently as 1972 that concepts of due process have no application to parole proceedings, quoting approvingly language stating that a prisoner "does not qualify for procedural due process in seeking parole." *Goble v. Bounds*, 281 N.C. 307, 311, 188 S.E.2d 347, 350. Accordingly, it would have been futile to lay the complaint filed herein before a State court, and Section 2254(b) was therefore satisfied. See *Evans v. Cunningham*, 335 F.2d 491 (C.A. 4); *Developments in the Law – Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1098-1100 (1970).

On either of the foregoing grounds, the District Court had jurisdiction over the case, and the decision of the Court of Appeals to reach the merits was correct.

II.

PAROLE BOARDS CONSIDERING THE QUESTION OF SUITABILITY FOR RELEASE ARE REQUIRED TO AFFORD PRISONERS, AS MINIMUM PROTECTIONS OF PROCEDURAL DUE PROCESS, A HEARING, AN OPPORTUNITY TO KNOW AND REBUT FACTUAL INFORMATION WHICH MAY PROMPT AN ADVERSE DECISION, AN OPPORTUNITY TO CONSULT WITH AVAILABLE COUNSEL IN PREPARING FOR THE HEARING, AND A WRITTEN STATEMENT OF THE REASONS FOR AN ADVERSE DECISION

On the merits of the case, respondent will speak first to the contention, rejected by the Court of Appeals below, that the Due Process Clause is entirely inapplicable to parole-release decisionmaking,[6] and then (after briefly considering the appropriateness of this Court's here reaching the question) will attempt to set forth the minimum protections which should comprise the content of due process in this field.

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[6]This brief is not addressed to the question raised by proceedings in which a parole board or its equivalent is empowered to fix the minimum period a prisoner must serve before becoming *eligible* for parole. *E.g.*, N.Y. Penal Law §70.00(3)(c). Such a proceeding is more closely analogous to deferred sentencing imposed by a court. *Cf. Mempa v. Rhay*, 389 U.S. 128.

A. The Due Process Clause Is Applicable to the Procedures Employed in Parole-Release Decisionmaking

Petitioners renew in this Court their contention that the Due Process Clause of the Fourteenth Amendment has no application to parole-release procedures, a contention rejected not only by the Court of Appeals for the Fourth Circuit below (Pet. 11-15), but by the Second and District of Columbia Circuits as well. United States *ex rel. Johnson v. Chairman*, 500 F.2d 925 (C.A. 2), vacated as moot *sub nom. Regan v. Johnson*, 419 U.S. 1015; *Childs v. United States Board of Parole*, 511 F.2d 1270 (C.A.D.C.).[7] Petitioners' position, in brief, rests on a distortion of the realities of the parole system—its role in the sentencing process, its operations and processes, the relation of inmates to it—and on a failure to recognize the flexibility and adaptability of the concept of procedural due process as this Court has given it shape.

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[7]In addition, the Seventh and Tenth Circuits have spoken favorably of the strength of the case for the applicability of the Due Process Clause, while upholding challenges to U.S. Board of Parole procedures on statutory grounds. *King v. United States*, 492 F.2d 1337, 1342-43 (C.A.7); *Mower v. Britton*, 504 F.2d 396,397 (C.A.10). And *cf.* the Third Circuit decisions in *Fisher v. Cahill*, 474 F.2d 991, and *Laffey v. Sigler*, __F.2d__ (No. 74-2158, June 20, 1975).

In light of these decisions—and see note 9, *infra*, for the Fifth Circuit cases—the Solicitor General's description of the weight of Court of Appeals authority, Br. *amicus curiae*, p. 24 n.8, is quite misleading. The fact is that, since Mr. Chief Justice Burger's landmark opinion in *Morrissey v. Brewer*, 408 U.S. 471, *no* Circuit has held to the position asserted by petitioners here.

1. The Flexibility of the Due Process Clause.

"It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481. Accordingly, hearings to determine continued eligibility for public assistance must afford the rights of confrontation and cross-examination and the assistance of retained counsel, but do not require the appointment of counsel, *Goldberg v. Kelly*, 397 U.S. 254; hearings looking toward revocation of probation or parole may, on finding of good cause by the hearing officer, withhold the rights of confrontation and cross-examination, *Morrissey v. Brewer*, 408 U.S. at 487-89, but there is a right to appointed (as well as retained) counsel in certain designated circumstances, to be decided on a case-by-case basis, *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91; inmates facing prison disciplinary proceedings have no right of confrontation, but are afforded a limited right to call witnesses on their behalf and to have the assistance of a counsel-substitute, *Wolff v. McDonnell*, 418 U.S. 539, 567-70; students facing public school disciplinary proceedings need not be afforded the right to call supporting witnesses (nor, *a fortiori*, are they entitled to the rights of confrontation or legal assistance), but they do ordinarily have the right to prior notice and an opportunity to appear personally to present their version of events, *Goss v. Lopez*, 419 U.S. 565, 581.

In this process of "mutual accommodation" (*Wolff v. McDonnell*, 418 U.S. at 556) among competing interests, there is no room for the "all or nothing" approach frankly avowed by the Commonwealth of

Virginia (Brief *amicus curiae*, p. 5)[8] and only more subtly conjured up by such casual phrases as the petitioners' "adversary procedural format" (Br. 17) or the District Court's "plenary hearings" (App. 23). Indeed, the Court of Appeals' decisions which petitioners invoke–*Menechino v. Oswald*, 430 F.2d 403, and *Scarpa v. United States Board of Parole*, 477 F.2d 278–reach results entirely consistent with respondent's contentions here, as Judge Mansfield, the author of *Menechino*, expressly recognized as to that case in his opinion for the court in *Johnson*.[9]

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[8] "*[O]rdinary* due process requirements . . . would tend to bankrupt and disrupt the parole system . . . [but] if *none* of these requirements were applicable . . ., a decision holding the clause to be applicable would be somewhat meaningless." Va. Br. 5 (Emphasis supplied).

[9] *Johnson*, like the court below, held that "some degree of due process attaches to parole release proceedings." 500 F.2d at 928 n.2. It limited its earlier *Menechino* ruling to a holding (with which we do not quarrel) that the parole applicant there, seeking a "whole gamut" of procedural protections (principally the right to counsel at the hearings and the right to cross-examine witnesses), was not entitled to this "full panoply" of due process rights. The language of *Menechino* relied on by petitioners here (Br.9) was reconsidered, in light of the realities of the parole process and the *Morrissey* decision of this Court. See 500 F.2d at 927-28. The decision in *Johnson* was vacated by this Court on grounds of mootness, *sub nom. Regan v. Johnson*, 419 U.S. 1015.

Scarpa, as the court viewed it, was a challenge to the authority of the Board of Parole to give conclusive weight to the applicant's criminal record in denying parole. Scarpa sought a hearing at which he might bring other facts, relating to his family and employment situation, more adequately to the Board's attention. The court held (correctly, in our view) that the Board had discretion to give controlling weight to the factor it relied

Similarly, the Solicitor General's vague forebodings (Br. *amicus curiae*, pp. 4-5), that Congressional competence to respond as evolving concepts of wise parole policy suggest "could" be "hindered," "precluded," or "substantially affected" by an affirmance here, rest on a false dichotomy between exclusive legislative and exclusive judicial competence which, at bottom, is only the "all or nothing" approach in separation-of-powers garb. It is relevant to note, not only that the House-passed bill to which the Solicitor General refers (*id.* at 4 & n.2) is entirely consistent with respondent's contentions here, see p. 38, *infra*, but that to its principal sponsor the "infusion of due process" into parole release decision-making–"clearly a necessary step forward"–is part of a regime of complementary, rather than mutually exclusive, judicial and legislative action. Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Decline of Mythology*, 22 Am. U.L. Rev. 477, 522 (1973).

In considering the question of the applicability of due process, it is by now clear beyond argument that neither the fact that we are dealing with convicted

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on. 477 F.2d at 282; *cf. Creason v. North Carolina Bd. of Paroles*, __F.2d__ (No. 75-1534, June 3, 1975). The *Scarpa* decision was vacated by this Court for consideration of the question of mootness, 414 U.S. 809, and vacated as moot, 501 F.2d 992 (en banc). The Fifth Circuit has since ruled that the constitutional issued addressed by the broader dicta from *Scarpa*, on which petitioners rely (Br. 8), should be reconsidered by the court on a factual record. *Ridley v. McCall*, 496 F.2d 213, 214 ("*Scarpa* has no precedential value"). The Solicitor General cites *Scarpa* as reflecting the law of the Fifth Circuit, Br. *Amicus Curiae* 24 n.8, without mentioning *Ridley*.

prisoners, nor the fact that there is no right to parole, is dispositive of the question. "There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. at 555-56. And "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege.'" *Graham v. Richardson*, 403 U.S. 365, 374. The case for drawing the line short of applicants for parole rests on characterizing a prisoner's interest in parole as "nothing more than a hope" (Br. for Pet. 8), too evanescent to warrant characterization as either "liberty" or "property," and on viewing the release decision as *wholly* the exercise of an "intangible," "predictive" discretion (*id.* at 18). Respondent submits that, for reasons now to be set forth, these notions draw insufficient support from the reality of the functions and operations of the parole system and, in truth, simply resurrect the rejected "privilege" concept in more refined terms.

2. The Nature of a Prisoner's Interest in Parole Release.

The insight into "the function of parole in the correctional process" with which the Chief Justice began the opinion of the Court in *Morrissey v. Brewer* is the essential point of departure:

> During the past 60 years, the practice of releasing prisoners on parole before the end of their sentence has become an integral part of the penological system.... Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into

> society as constructive individuals as soon as they are able. . . . It also serves to alleviate the costs to society of keeping an individual in prison.

408 U.S. 471, 477. This concept of parole as "an integral part" of penology has three relevant ingredients. *First*, as the Chairman of the U.S. Board of Parole has noted, "the parole process is inseparable from the sentencing process." Sigler, *Abolish Parole?*, Fed. Prob., p. 47 (June 1975). "[T]oday parole boards and judges are expected to exercise their discretion to determine the proper sentence. . . . Parole legislation involves essentially a delegation of sentencing power to the parole boards. The parole decision involves many of the same kinds of factors that are involved in the original sentencing decision." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 86 (1967). In short, "the function of parole boards at release hearings and of judges at sentencing are virtually identical." Parsons-Lewis, *Due Process in Parole-Release Decisions*, 60 Calif. L. Rev. 1518, 1534 (1972). *Second*, release on parole is not an exceptional stroke of good fortune, saving a few prisoners from serving their full term. In 1970, 72% of those adult felons who left prison did so on parole; "parole is the predominant mode of release for prison inmates today, and it is likely to become even more so." National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 389 (1973).[10] The Official Report of the New York State

[10]The earlier *Report* of the Task Force on Correction of the President's Commission on Law Enforcement and Administration of Justice reports a figure, as of 1967, in excess of 60 percent (*id.* at 60 (1967)). See also the data cited in Judge Mansfield's opinion in *Johnson v. Chairman*, 500 F.2d at 928.

Commission on Attica expressed the truth tersely: "In practice, the Parole Board—not the judge—decides how long an inmate will serve time." *Attica* 93 (1972). *Third*, parole release is not "leniency." Studies have shown that "actually prisoners serve as much time in confinement in jurisdictions where parole is widely used as in those where it is not." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 62 (1967). According to a recent survey, the great majority of federal judges consider parole in sentencing, and approximately one-half set the sentence on the assumption that the prisoner will be released on parole after serving one-third of it. Two-thirds of the judges said that they expected sentenced defendants to be released before serving the maximum sentence imposed. Note, *Parole Release Decision-making and the Sentencing process*, 84 Yale L.J. 810, 882 n.361 (1975). Thus, "today . . . the legal maximum is not considered the norm. Parole . . . should not be considered any more a matter of grace than any sentence which is less than the maximum provided for by statute." *Id.* at 86.[11]

In sum, the "hope" of parole release is one which is realized for a very large number of prisoners; which is expected to be so realized by legislators in setting statutory maxima and by judges in making partially-indeterminate sentences; and which is realized or not by a process which is essentially one of deferred determination of the wisdom of continued incarceration or controlled liberty. It is, therefore, "more than an

[11]*Cf.* the explicit declaration of the Texas statute:

"A parole shall be ordered only for the best interests of society, not as an award of clemency. . . ." Code Crim. Proc., Art. 42.12, §15.

abstract need or desire . . ., more than a unilateral expectation . . ." of release (*Board of Regents v. Roth*, 408 U.S. 564, 577); it is an expectancy which "has real substance" (*Wolff v. McDonnell*, 418 U.S. at 557).[12]

In these circumstances, it is not controlling that respondent is not entitled to release. As Professor K. C. Davis has observed: "[O]ne who lacks a 'right' to a government gratuity may nevertheless have a 'right' to fair treatment in the distribution of the gratuity." Davis, *Administrative Law Text* 177 (3d ed. 1971). Prisoners in respondent's circumstances have been specifically told by the North Carolina legislature that they "shall be eligible to have their cases considered for parole. . .," and that the statute "shall be construed as . . . guaranteeing to every prisoner a review and consideration of his case upon its merits." No. Car. Gen. Stat. Ann. §148-58.[13] This promise—which makes explicit what is implicit in the parole system generally—is one "upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents v. Roth*, 408 U.S. at 577. It is

[12]The Solicitor General's characterization of the prisoner's expectations as "self-generated" (Br. *amicus curiae*, p. 25) draws no sustenance from the total reality of the sentencing process.

[13]The statute reads in full as follows:

> "All prisoners shall be eligible to have their cases considered for parole when they have served a fourth of their sentence, if their sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate; provided, that any prisoner serving sentence for life shall be eligible for such consideration when he has served 20 years of his sentence. Nothing in this section shall be construed as making mandatory the release of any prisoner on parole, but shall be construed as only guaranteeing to every prisoner a review and consideration of his case upon its merits."

therefore within the ambit of interests subject to the protection of procedural due process.[14]

Petitioners' suggestion that for purposes of the applicability of the Due Process Clause, there is a line of constitutional significance between revocation and release proceedings, between staying in and going back (Br. 8-10), is, in Judge Mansfield's words, "a distinction too gossamer-thin to stand close analysis." *Johnson v. Chairman*, 500 F.2d at 928. It is flatly inconsistent, even in concept, with a number of decisions in which this Court has refused to find so wide a gap between the interests of those seeking to obtain, and those seeking to retain, some governmental benefit. See, *e.g.*, *Willner v. Committee on Character and Fitness*, 373

[14]Any broader reading of *Roth*, to require a technical "entitlement" to parole in the sense of a litigable property right (as the Solicitor General would have it, Br. *amicus curiae*, pp. 20-22), is unwarranted. *Cf.*, for example, *Flemming v. Nestor*, 363 U.S. 603, where the Court, having first specifically rejected the contention that the interest in social-security benefits was an "accrued property right," *id.* at 610, immediately went on to hold that it was "of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Id.* at 611. And *cf. Goss v. Lopez*, 419 U.S. 565, 572-74.

A similar result is called for even on the approach adopted by three members of this Court in *Arnett v. Kennedy*, 416 U.S. 134, 151-55 (opinion announcing judgment, by Rehnquist, J.), for the statutory "guarantee" of a review and consideration of parole suitability "upon its merits" (n. 13, *supra*) is *not* one which "expressly provided also for the procedure by which [suitability] was to be determined, and expressly omitted the procedural guarantees which [respondent] insists are mandated by the Constitution." *Id.* at 152. The position of the majority of the Court in *Arnett v. Kennedy a fortiori* supports respondent's position here. See *id.* at 166-67 (Powell, J.), 185 (White, J.), 210-11 (Marshall, J).

U.S. 96, and *Schware v. Board of Bar Examiners*, 353 U.S. 232 (admission to the Bar); *Speiser v. Randall*, 357 U.S. 513 (application for tax exemption); *Simmons v. United States*, 348 U.S. 397 (application for draft exemption); *cf. Hornsby v. Allen*, 326 F.2d 605 (application for a liquor license).[15] There is, to be sure, a difference between denial of release and revocation, principally with regard to the specificity of the basis for the adverse action; and (as we recognize below) that difference warrants a lessened degree of protection. It would be arid conceptualism to let it control the question of applicability.[16]

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[15]There is one area where the distinction urged by petitioners has found voice in earlier decisions of this Court. That is in immigration, where some decisions deem constitutional protections available to those sought to be deported, but not those seeking admission. *E.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206. Far from reflecting any principle of general applicability, those decisions, if supportable at all, reflect the unique circumstances of Congressional power over aliens seeking to enter the country. That they are inconsistent, even within that specific field, with the constitutional traditions of this Court has been demonstrated with memorable power and eloquence by the late Professor Henry M. Hart; see Bator, Mishkin, Shapiro & Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 350-56 (2d ed. 1973).

[16]*Cf.* the analysis offered by the Solicitor General (Br. *amicus curiae*, p. 17), which acknowledges that "liberty" is at stake, but denies that the prisoner can be "deprived" of it by the denial of parole release, since he has, "in a very basic sense," already been deprived of liberty by his sentence until its maximum term has run. This perspective on the sentencing process is, as the foregoing paragraphs make clear, a serious distortion of reality. Indeed, it leads inevitably to the position that even the parolee lacks a "liberty" interest, and that *Morrissey v. Brewer, supra*, though "purportedly" speaking of liberty, was "in fact" a property case (Br., p.20 n.7). Thus, the Solicitor General rejects both the legal analysis, 408 U.S. at 482, and the view of the sentencing process, *id.* at 477 (p. 19, *supra*,) which are at the core of the *Morrissey* decision.

As to the weight of the prisoner's interest, in either case the question for the future is the same: incarceration or controlled liberty.[17] While the parolee suffers a different sort of worsening of his condition if he loses that liberty, the question is not which group of persons is worse off, but whether the prisoner's situation is also significantly worsened when he learns that his incarceration must continue. It cannot be said that it is not. Freedom is one of the strongest, most universal aspirations of mankind, one which is legitimated by our most basic religious and political traditions and, as to prisoners, legitimated by the function served by parole in the correctional system; no prisoner should be presumed so dehumanized or debased that he may be said to be no worse off if he is "merely"[18] continued in prison.

3. The role of Discretion and Predictive Judgment in Parole-Release Decisionmaking.

The notion that due process concerns should play no role in parole-release decisionmaking because it involves a discretionary, predictive, professional judgment–"a difficult decision . . . based on many factors," in the

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[17]In *Wolff v. McDonnell, supra*, the Court considered, as a factor affecting the requisite *degree* to which disciplinary proceedings called for protection, the likelihood that forfeiture of good time would cause denial or delay of parole. 418 U.S. at 561. The Court's evident assumption was that such postponement of supervised release was an even more serious harm than forfeiture of good time.

[18]The Solicitor General's term, Br. *amicus curiae*, p. 18.

words of the District Court below (App. 21-22)[19]– reflects the hazards of letting a partial truth serve as the whole truth. The release decision, respondent acknowledges, is not *simply* the finding of facts, not *simply* the application of a few reasonably well-settled principles to known or adjudged facts. And that perception, we shall acknowledge below, suggests the inaptness of certain procedures typically associated with due process (such as the rights of confrontation and cross-examination, and perhaps even the right to call supporting witnesses). But this Court has recognized that rhetoric about the special characteristics of correctional institutions must be tempered by candid and sober recognition of competing realities. *E.g., Gagnon v. Scarpelli,* 411 U.S. 778, 785, counselling against "an exclusive focus on the benevolent attitudes of those who administer the probation/parole system"; *In re Gault,* 387 U.S. 1, and *Breed v. Jones,* __U.S.__, 95 Sup.Ct. 1779, applying due process concepts to juvenile-court proceedings, recognizing "that there is a gap between the originally benign conception of the system and its realities." *Id.* at ___, 95 Sup. Ct. at 1785; *In re Gault,* 387 U.S. at 21-22.

[19]The dicta (now withdrawn, see p. 17, *supra*) of the Second Circuit's opinion in *Menechino v. Oswald* are even more eloquent: "There are no "charges" or accusations against [a parole applicant]. Nor is the Board necessarily called upon . . . to resolve disputed issues of fact. . . . It must make the broad determination of whether rehabilitation of the prisoner and the interests of society would best be served [by parole or confinement]. It must consider many factors of a non-legal nature. . . . Far more important [than law] is an understanding of . . . factors . . . which have to do with medicine, psychiatry, criminology, penology, psychology and human relations." 430 F.2d at 407-08.

The obvious fact is that "correctional judgments turn on matters of historical fact concerning the offender, as well as scientific ones." Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes,* 75 Harv. L. Rev. 904, 927 (1962).[20] The accuracy of this simple perception is strikingly indicated by recent actions of the United States Board of Parole. In an attempt to reduce by its own initiative "the arrant subjectivism of undisciplined and unguided discretion," Kadish, *ibid.*, the Board has promulgated detailed Guidelines setting forth normal periods of incarceration for inmates to serve before release "for various combinations of offense . . . and offender . . . characteristics . . . [assuming] good institutional adjustment and program progress." 28 C.F.R. §2.20(b), as amended, 40 F.R. 41333 (1975).[21] The average time to be served is found by measuring the classification given the particular offense–e.g., minor theft is "low," theft of a single motor vehicle not for resale is "moderate," organized vehicle theft is "high," robbery is "very high"–with the "offender characteristics" as disclosed by the "salient factor score." This last comprises the applicant's parole prognosis as measured by nine factors. The startling fact is that seven of the nine factors relate to the inmate's pre-incarceration record and behavior, generally known to the inmate and the sentencing judge as the time of sentencing; that none of them involve "delicate" or "sensitive" or "confidential"

[20]See also, by the same author, Kadish, *The Advocate and the Expert – Counsel in the Peno-Correctional Process,* 45 Minn. L. Rev. 803, 829 (1961).

[21]A copy of the Guidelines, as most recently revised, is annexed to this brief as Appendix B.

matters; and none involve subtle, complex psychological-medical-criminological evaluations.[22]

Thus, the Board's own exercise of discretion has gone far to demystify the parole process, and to put in perspective the more extravagant descriptions of parole. While parole decisionmaking remains a complex, multi-faceted inquiry not analogous to a typical lawsuit, it is now clear—as indeed it was heretofore—that there *are* matters relevant to the decision to which the protections of due process are appropriately relevant. Indeed, descriptions of the process as essentially a mystical, unfathomable one reflect nothing more than the "all or nothing" approach to due process which, as we argued above (p. 17), this Court has effectively laid to rest.

It is plain, then, that the perceptions given voice in *Morrissey* and *Scarpelli* have some substantial applicability to release decisionmaking. "Both the . . . parolee and the State have interests in the accurate finding of fact and the informed use of discretion," *Gagnon v. Scarpelli*, 411 U.S. at 785; "Society thus has an interest in not having parole revoked because of erroneous information . . . and . . . a further interest in treating the parolee with basic fairness," *Morrissey v. Brewer*, 408

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[22]The Salient Factors are: number of prior convictions, number of prior incarcerations, age at first commitment, presence of auto theft, prior revocation of parole, history of heroin or opiate dependence, high school graduation or equivalent, verified recent employment or school attendance prior to incarceration, release plans to live with spouse or children. See App. B, *infra*, 40 F.R. at 41337. See generally Note, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810, 822-28 (1975), for a description of the system.

U.S. at 484. The vehicle by which our constitutional traditions seek to safeguard these interests is the flexible concept of due process. As Mr. Justice Frankfurter observed in his oft-cited concurring opinion in the *Joint Anti-Fascist* case:

> That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72. And *cf. In re Gault*, 387 U.S. at 21.

4. The Administrative Burden of Minimum Due Process.

Petitioners conclude with the standard predictions that minimum due process safeguards will place an unbearable administrative burden on the Board of Paroles (Br. 18, quoting also from the opinion of the District Court). This Court has quickly put such contentions in their proper perspective. A footnote in *Breed v. Jones*, __U.S.__, 95 Sup. Ct. 1779, 1789 n.5, readily acknowledged "that the flexibility and informality of juvenile proceedings are diminished by the application of due process standards," but replied: "Due process standards inevitably produce such an effect, but that tells us no more than that the

Constitution imposes burdens on the functioning of government and especially of law enforcement institutions." *Cf. Gagnon v. Scarpelli,* 411 U.S. at 782 n.5; *Taylor v. Hayes,* 418 U.S. 488, 500. "A simple factual hearing will not interfere with the exercise of discretion." *Morrissey v. Brewer,* 408 U.S. at 483. Parole boards are not unique among government agencies in their interest in "speedy resolution" of cases, in "dealing with [applicants] informally," and in managing "very burdensome caseloads," *Goldberg v. Kelly,* 397 U.S. at 267, and this Court has not found it difficult to accommodate legitimate State interests, in the correctional field as elsewhere, in articulating the content of due process protection.

It would be ironic to see parole uniquely insulated from the strictures of minimum due process, in light of the near-unanimity with which scholars, legislative committees, official and citizens' study commissions, and judges have criticized the arbitrariness of the parole process as traditionally carried on. So experienced and careful a scholar as Professor K.C. Davis flatly concluded in 1969 (prior to recent reforms): "[T]he performance of the Parole Board seems on the whole as low in quality as anything I have seen in the federal government. . . ." Davis, *Discretionary Justice* 133 (1969). A recent report of the House Judiciary Committee set forth the observations of one of its Subcommittees in these terms:

> Everywhere the Subcommittee went they found universal dissatisfaction with the parole process. Wardens claimed that it was a major cause of institutional tension. Inmates felt that they were being treated inequitably. Judges felt that discrepancies within the system made a mockery of

> the sentencing process. . . . The parole system has long been recognized as the single most inequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map.

H. R. Rep. No. 94-184, 94th Cong., 1st Sess., at 3 (1975). *Cf.* Judge Marvin Frankel's reaction: "In all disarming candor, [the Parole Board] presents itself as the epitome of lawless authority." Frankel, *Criminal Sentences* 48 (1972). The Chairman and Chief Counsel of a House of Representative Subcommittee which extensively studied the parole system observed: "[P]arole epitomizes for most inmates a system of whim, caprice, inequity, and nerve-wracking uncertainty." Kastenmeier & Eglit, *Parole Release Decisionmaking: Rehabilitation, Expertise, and the Demise of Mythology,* 22 Am. U.L. Rev. 477,488 (1973). The Official Report of the New York State Special Commission on Attica reached similar conclusions: "Inmates' criticism were [sic] echoed by many parole officers and corrections personnel, who agreed that the operation of the parole system was a primary source of tension and bitterness within the walls." *Attica* 93 (1972).[23] That judicial "intervention"

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[23]On the qualification of members of parole boards, see O'Leary & Nuffield, *A National Survey of Parole Decisionmaking,* 19 Crime and Delinq. 378, 383 (1973):

> "The standards promulgated by the American Correctional Association specify that a parole board member should "command respect and public confidence"; should be appointed "without reference to creed, color, or political affiliation"; should possess "academic training which has qualified a board member for professional practice in a field such as criminology, education, psychiatry, psychology, law, social work, and sociology"; and should have "intimate knowledge of common situations and problems

is far from a threat to the growth of a sound parole system has been attested to by the current Chairman of the U.S. Board of Parole: "Much has been done to improve parole, and I would be the first to say that the courts have been extremely influential in this respect." Sigler, *Abolish Parole?*, Fed. Prob., June 1975, at 48. It would be tragic to see that influence removed by ritualized references to a "delicate predictive task" and "unreasonably burdensome" procedures (Br. for petitioners, at 18).

"Especially in view of the human values at stake, therefore, the position that in these inquiries the subject may be deprived of the elementary concomitants of a hearing, wherein he may be advised of the factual issues of relevance with an opportunity to contest their accuracy and their implications, is at war with fundamental conceptions of procedural justice." Kadish, *supra*, 75 Harv. L. Rev. at 928. In seeking to subject parole release decisionmaking to minimum constitutional safeguards, respondent rests ultimately on no more controversial ground than that the discretion of the parole board is a discretion to be exercised under the law. The principle respondent invokes has not been better stated than in the following description of decisions of this Court by Professor Hart:

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confronting offenders." The 1966 survey found that relatively few states had statutory criteria that would measure up to these standards; the 1972 survey indicated little change. Twenty-four jurisdictions have no statutory requirements for parole board members responsible for the release of felony offenders. One state makes generalized references to character; twenty-one states refer broadly to experience or training."

> "Before long, however, [the Court] began to see that . . . a power to lay down general rules, even if it were plenary, did not necessarily include a power to be arbitrary or to authorize administrative officials to be arbitrary. It saw that, on the contrary, the very existence of a jurisdiction in habeas corpus, coupled with the constitutional guarantee of due process, implied a regime of law. It saw that in such a regime the courts had a responsibility to see that statutory authority was not transgressed, that a reasonable procedure was used in exercising the authority, and . . . that human beings were not unreasonably subjected . . . to an uncontrolled official discretion."

Bator *et al, op. cit. supra,* at 350-51.

The decision of the Court of Appeals, holding that parole-release decisionmaking procedures are subject to the Due Process Clause, should be affirmed.

B. The Minimum Standards of Procedural Due Process in Parole Release Proceedings Include the Right to a Hearing, an Opportunity to Know and Rebut Factual Information Which May Prompt an Adverse Decision, an Opportunity to Consult With Available Counsel in Preparing for the Hearing, and the Right to a Written Statement of the Reasons for an Adverse Decision

1. The Appropriateness of Reaching the Question.

If the Court holds, as we have argued, that the Due Process Clause is not entirely inapplicable to parole-release determination, the question then arises, "what process is due," *Morrissey v. Brewer,* 408 U.S. at 483. The court below did not address that issue on the

ground that, the case having arisen solely on the dismissal of respondent's unanswered complaint, petitioners' "practices and procedures with respect to parole eligibility proceedings have not been shown", and their "interests in preserving the practices and procedures currently followed have not been developed" (Pet. 16). Because of the limited nature of the Court of Appeals' action–contrast, for example, the situation presented in *Gerstein v. Pugh*, 420 U.S. at 125 n. 27–as well as the considerations which prompted it, this Court may deem it appropriate to go no further. Such an action would permit the Court to give content to the due process requirement on the basis of full records describing practices and competing interests, in North Carolina and other States, established and sharpened through the fact-finding processes of litigation on the merits. Cf. the comparable judgment of the Fifth Circuit, remanding a case challenging parole board procedures for "development of the actual facts, not just the pleaded contentions of the parties." *Ridley v. McCall*, 496 F.2d 213, 214.

The Court may be reluctant, however, to leave the matter so wholly unresolved. The District Court, although holding that the Due Process Clause did not apply at all, went on specifically to reject each particular procedural protection sought by the complaint (App. 22-23). In addition, similar issues are raised in many cases pending throughout the state and federal courts. Moreover, in analogous areas–*Morrissey v. Brewer, supra* (parole revocation); *Wolff v. McDonnell*, 418 U.S. 539 (disciplinary proceedings); *Gerstein v. Pugh, supra* (pretrial detention); and *cf. Goss v. Lopez*,

419 U.S. 565 (suspension from school)–the Court's initial ruling has frequently gone beyond the principle that due process requirements apply. Therefore–and also because the Court may find resolution of the question of due-process-applicability less abstract if its content is addressed by counsel as well–respondent presents in this section his contentions as to what this "particular situation demands." *Morrissey v. Brewer*, 408 U.S. at 481.[24]

If these questions are reached, however, it is essential to bear in mind the fragmentary state of present general knowledge about parole procedures and the realities of the parole process. As the current Chairman of the United States Board of Parole recently observed, for many years parole "was a world of its own, sealed off from public scrutiny." Sigler, *Abolish Parole?*, Feb. Prob., at 43 (June 1975). The "facts" as to the operation of the system, whether in North Carolina or more generally, should not be taken from the rosy-hued "testimony" of government lawyers. The description, for example, of the North Carolina system set forth in petitioners' brief (pp. 15-16 & n.4), and restated in that of the Solicitor General (pp. 6-7), comprises assertions as to matters of fact which are not in the record, which at several points impermissibly (given the procedural posture of the case) contradict several allegations of the complaint, and which in general

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[24]In *Morrissey v. Brewer, supra*, the Court took a middle ground. A number of minimum requirements were spelled out, but the question of right to retained or appointed counsel was reserved. 408 U.S. at 489. *Cf. Wolff v. McDonnell, supra*, where the Court made clear that the protections it was requiring were minimum ones, and left open the possibility of augmenting them in light of evolving prison conditions. 418 U.S. at 568, 571-72.

substitute rhetoric for litigation as the method of learning the truth. Respondent has attempted, in what follows, to base his contentions on the realities of the parole system to the extent they are suggested by published materials. Ultimately, however, respondent has a right, like all litigants, to a "day in court" if matters of fact or practice, contrary to those he asserts, are thought to be dispositive.[25]

2. The Minimum Standards of Procedural Due Process.

(a) Introduction and Summary.

Respondent submits for the Court's consideration the following summary of the minimum standards of procedural due process properly applicable to parole-release determinations:

(1) The right to appear in person for a reasonable period of time before the Board, a Board member or a hearing examiner, except where the prisoner is clearly ineligible for parole on the basis of undisputed facts under a valid eligibility rule not subject to waiver in individual cases; and to submit supporting written material in advance of the hearing for inclusion in the file made available to the person conducting the hearing.

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[25]The embryonic state of present knowledge about the world of parole suggests that the Court should make clear, as it did in *Wolff v. McDonnell*, 418 U.S. at 567, 571-72, that any standards of due process it adopts in this case are minimum ones, subject to augmentation in light of proofs yet to be made regarding competing interests.

(2) The right to adequate notice of, and an adequate opportunity at any hearing to rebut, information and recommendations which may prompt a denial or postponement of parole. Where such notice is given through a summary which preserves the confidentiality of sensitive matter, the summary must sufficiently apprise the prisoner of the nature and tenor of the factors that might lead to an adverse decision.

(3) The right to the assistance of such counsel or counsel-substitute as may be available in preparing for the hearing. This right shall include an opportunity for counsel or counsel-substitute to have access to, and consult with the prisoner about, the material referred to in the preceding paragraph.

(4) The right to a written statement of the reasons for any denial or postponement of parole, with sufficient particularity to provide meaningful disclosure of any factual matters on which it was predicated and of any area of the prisoner's failure and the ways in which he might qualify in the future.

The procedural protections which are claimed reflect an attempt to respect the concern for "mutual accommodation between institutional needs and objectives" and constitutional safeguards, *Wolff v. McDonnell*, 418 U.S. at 556, which has animated this Court's recent due process decisions in the correctional field and elsewhere. *Cf. Franklin v. Shields*, __F.Supp.__, 17 Cr. L. Rep. 2494 (W.D. Va., Aug. 5, 1975). They not only are far less than the "minimum procedural safeguards," *Goldberg v. Kelly*, 397 U.S. at 267, tailored for adversary proceedings—see, *e.g.*, *Morrissey v. Brewer*, 408 U.S. at 489; *Goldberg v. Kelly*, 397 U.S. at 267-72; *In re Gault*, 387 U.S. 1,—they are supported

by, but stop significantly short of, proposals for reform which responsible public bodies have recently concluded can be adopted in the parole-release process without endangering legitimate institutional interests, and should be adopted to protect legitimate prisoner and societal interests in fairness and equity. Thus, the Administrative Conference of the United States has recommended that the file, and not merely a summary, ordinarily be disclosed to the prisoner, and that counsel be permitted to assist at the hearing and not merely in preparation for it. Administrative Conference Recommendation 72-3, 25 Ad.L.Rev. 531, 533, 534 (1973). The House of Representatives has recently passed and sent to the Senate a proposed "Parole Reorganization Act of 1975," which would have similar effect. See H.R. 5727, 94th Cong., 1st Sess., §1 (proposed §4208(a)(2), (b), (c)), 121 Cong. Rec. H4521 (May 21, 1975).

(b) The right to an adequate hearing.

Forty-five jurisdictions grant an opportunity to be heard in person to all prisoners whose suitability for parole is being reviewed.[26] O'Leary & Nuffield, *A National Survey of Parole Decision-making*, 19 Crime

[26]In North Carolina, such review is apparently annual once the eligibility date is reached. See O'Leary & Nuffield, *The Organization of Parole Systems in the United States* 106 (1972). The position respondent asserts herein would leave it to each jurisdiction to decide, as it does now, when suitability for parole is to be considered.

and Delinq. 378, 384 (1973). The complaint alleges (Complaint, para. 8, App. 10) that North Carolina does not, an allegation which finds support in published writings, *e.g.*, O'Leary & Nuffield, *The Organization of Parole Systems in the United States* 106 (1972), and is confirmed by the factual assertions made in petitioners' brief (p. 16 n.4). It seems clear that, if due process is to play any role at all, the right to appear in person is its first requisite; *cf. Goldberg v. Kelly*, 397 U.S. at 269. Indeed, the near-unanimity of its use attests to its utility and workability. "Authorities on parole procedures regard well-conducted hearings as vital to effective decision-making, in terms of expanding the information available to the board as well as for their effect on offenders." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 64 (1967). See also Dawson, *Sentencing* 253 (1969).

The State has an interest, to be sure, in not wasting time and money on a futile hearing. Accordingly, where it is certain that an applicant must be denied release under a valid general rule of undisputed applicability and universal application, the hearing may be dispensed with. An example is a rule, such as may exist in the federal prisons, 28 C.F.R. §2.29, barring release for those whose good time has been forfeited and not yet restored. Where, however, the applicability of any such rule to the applicant is disputed by him or where the Board reserves the power to waive the rule in individual cases, there must be an opportunity to be heard on the question of applicability or waiver. Accordingly, a

prisoner must be given prior notice of an intention to deny a hearing on the basis of any such rule.[27]

If a hearing is required, it must be of sufficient duration to be more than a *pro forma* ritual. *Cf.* Dressler, *Practice and Theory of Probation and Parole* 117 (2d ed. 1962). The complaint alleges (para. 2(c)(5), App. 4) that, when hearings are given, they average ten minutes or less, and this assertion is consistent with the reports of a wide assortment of disinterested observers.[28] While it seems obvious that an adequate

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[27]The assertion in petitioner's brief that hearings are denied because "the files contain information that make it obvious" that parole will be denied (Br. 16 n.4) is an assertion of a far broader and more discretionary judgment than the exception set forth in the text would permit. It is equivalent to the assertion that a hearing is not an essential prerequisite to the exercise of the parole board's discretion. Moreover, it cannot suffice to contradict the allegation in the complaint (para. 2(c)(i), App. 4) that there are "no criteria or guidelines" to determine whether a hearing is to be given.

[28]O'Leary and Nuffield, *A National Survey of Parole Decision-making*, 19 Crime and Delinq. at 385, reports that in only 11 jurisdictions are less than 20 cases heard in a day; in 25, more than 30 are heard, and, in 11, forty or more. *Cf. In re Sturm*, 11 Cal.3d 258, 262, 521 P.2d 97, 99, 113 Cal. Rptr. 361, 363 (1974) ("generally . . . no more than 10 minutes"); *Official Report of the New York State Special Commission on Attica*, 96 (1972) ("average time of the hearing, including [reading the file and deliberation] is 5.9 minutes") Citizens Inquiry on Parole and Criminal Justice, *Prison Without Walls* 49 (1975) (New York; "the majority take between six and twelve minutes," see Table A5, *id.* at 194-99); Dawson, *The Decision to Grant or Deny Parole*, 3 Wash. U.L.Q. 243, 301 (1966) (Kansas; "two or three minutes each"); Hearings Before Subcommittee No. 3 of the House Judiciary Committee on H.R. 13118, 92d Cong., 2d Sess. at 451 (1972), (U.S. Board; 5 minutes); Note, *Parole Release*

hearing is impossible in such a short time, it is not possible to lay down a quantitative measure by which to judge whether the hearing has been held "in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552. The essential need is to recognize that, while considerations of caseload justify reasonable concern for expediting cases, there is a competing value of constitutional dimension involved, and the desire to "clean up the docket" is not to be the *only* input.[29]

(c) The right to adequate notice and opportunity to rebut.

The opportunity to know and meet the case against a person whose vital interests are at stake is one at the heart of due process protection, and ordinarily suggests rights of confrontation, full disclosure of adverse documents, and representation by counsel. *E.g., Goldberg v. Kelly*, 397 U.S. at 269-71. However, the fact that parole-release hearings are not typical adversary proceedings, have a large ingredient of discretionary judgment making potentially relevant a wide range of factors, and take place "within the walls," counsels

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Decision-making and the Sentencing Process, 84 Yale L.J. 810, 821 n. 48 (1975) (prior federal practice; "10 or 15" minutes). For a careful analysis supporting these indications, see Stanley, *Prisoners Among Us: The Problems of Parole* 3-18 to -20 (pre-publication ed., The Brookings Institution 1975).

[29]Ancillary to the right to appear is the right to supply documentary matter supporting an application for inclusion in the file which will be provided to the hearing examiner. As for a right to have supporting statements made in person at the hearing, see p. 49 n.34, *infra*.

something less than full protection. *Cf. Gagnon v. Scarpelli,* 411 U.S. at 787-88; *Wolff v. McDonnell,* 418 U.S. at 561-62. Thus, it may be that a State should be free to decide that witnesses will not be admitted or produced, whether favorable or unfavorable to the prisoner's case; that prison records and other material made available to the parole authorities will not be turned over; that counsel will not be admitted to the hearing; and that counsel will not be appointed to aid the prisoner in preparation for the hearing.

But, respondent submits, it is another matter entirely to deny the prisoner any meaningful knowledge of the nature and tenor of the factual premises of any impending adverse decision. A balancing of interests, a "mutual accommodation," *Wolff v. McDonnell,* 418 U.S. at 556, requires that some recognition be given to the strength of the interest in notice and opportunity to rebut. *Cf. Goss v. Lopez,* 419 U.S. 565, 581-84.

This Court has already adverted to the danger of factually erroneous or misleading information affecting prisoner interests in parole decisions. *Wolff v. McDonnell,* 418 U.S. at 565. And the specific allegations of the complaint, that material placed before the parole board members is "often" inaccurate or misleading and is placed there without "substantial safeguards" of reliability (para. 8(c)(i), (iii), App. 11-12), not only stands uncontradicted on this record, but is widely supported by the experience of judges, scholars and observers. "Everybody . . . who is closely connected with the processing of offenders knows that the recording of information is not treated with any great respect." Gottfredson *et al, Parole Decision Making* 49 (NCCD 1973). *Cf. In re Rodriguez,* 14 Cal.3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (file material, later proven

in error, led parole officers to believe that prisoner, who committed a non-violent sex offense, had violent intentions, 14 Cal.3d at 648 n.14; parole evaluation asserted that "family rejects him," when in fact prisoner had a home and employment in family business waiting for him, *id.* at 651 n. 16); *State v. Pohlabel,* 61 N.J.Super. 242, 160 A.2d 647 (1960) (presentence report erroneously stated, among other errors, that prisoner was under a life sentence in another jurisdiction); Note, *Parole Release Decision-making and the Sentencing Process,* 84 Yale L.J. 810, 834 n.107 (1975) (erroneous listing of a prisoner's brother's conviction as his); *Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature* 88, 91 (1974) (denial of parole, because of failure to utilize educational programs, by board member unaware that no such programs then existed at the unit to which the prisoner was assigned; misleading effect of vague and conclusory characterization of disciplinary violations); *Final Report of the Joint Committee on Prison Reform of the Texas Legislature* 89 (1974) ("[T]he Board has denied parole for reasons later discovered to be unfounded that might have been corrected if the inmate had had access to his files"); *Hearings Before Subcommittee No. 3 of the House Judiciary Committee,* 92d Cong., 2d Sess., at 451 (1972) (testimony of Dr. Gaylin) ("I have seen black men listed as white and Harvard graduates listed with borderline IQ's").

There is no conflict of interest between prisoner and board, or between prisoner and society, as to the need for accurate fact-gathering, and it is evident that disclosure fosters that interest. "Parole boards have as much stake in the accuracy of records as other criminal

justice officials. Evidence indicates that decisions are much more likely to be documented carefully and fully when information is disclosed and when those whose interests are at stake have a chance to examine and test it." National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 403 (1973). And while the claim that parole files are replete with sensitive and confidential matters appears to be greatly exaggerated,[30] respondent asks that this Court defer ruling on the question whether the actual file must be turned over to the prisoner, until it is presented on a record adequately describing the contents of parole files and providing a predicate for concrete examination of the competing interests involved. For the present purpose of considering the minimum standards of due process, respondent believes that the form of the notice given is of far less moment than its substance. Whether the entire file, portions of the file, or a separately-prepared summary is made known to a prisoner, the disclosure must be sufficiently factual and concrete to tell the prisoner what he might need to speak to, to alert him to any errors or misinterpretations which he might be able to set right. *Cf.* the new procedures of

[30] *Cf.* the conclusion of the National Advisory Commission, *op cit. supra,* that "in the average parole file little material is so sensitive that it cannot be reviewed with the inmate." *Id.* at 403. The consultant to the Administrative Conference in its study of federal parole procedures concluded that "most files do not seem to contain information that should not be disclosed." Johnson, *Federal Parole Procedures,* 25 Ad.L.Rev. 459, 489 (1973); see Cushman & Fleishchman, *Study of Parole Board Files, id.* at 509 (published as Appendix C to the Johnson Report). See the new disclosure requirements adopted by the U.S. Board of Parole, 28 C.F.R. §2.57(a), as amended, 40 F.R. 41342 (1975) (effective Oct. 6, 1975).

the U.S. Board of Parole, 28 C.F.R. §2.11(d), as amended, 40 F.R. 41332 (1975) (effective Oct. 6, 1975; see explanatory statement, *id.* at 41328).

In the analogous area of applications for conscientious-objector status under selective service laws, this Court has required a fair summary to be supplied the applicant, emphasizing the need to balance conflicting interests in language compellingly relevant here:

> We did not view this provision for a fair summary as a matter of grace within the Department's discretion, but rather as an essential element in the processing of conscientious objector claims. *United States v. Nugent,* [346 U.S. 1] represented a balancing between the demands of an effective system for mobilizing the Nation's manpower in times of crisis and the demands of fairness toward the individual registrant. We permitted the FBI report to remain secret because we were of the view that other safeguards in the proceeding, particularly the furnishing of a fair resume, maintained the basic elements of fair play. If the balance struck in *Nugent* is to be preserved, the registrant must receive the fair summary to which he is entitled.

Simmons v. United States, 348 U.S. 397, 403.[31] And weighty as may be the needs of prison discipline or the importance of judgment, discretion and expertise, petitioners must concede that selective service likewise

[31] While there the Court was dealing with statutory protections, the Congressional language was simply the general term, "hearing", *ibid.*, and judicial construction of the selective service law has typically been informed by considerations of due process. *Cf. Brewer v. United States,* 211 F.2d 864, 866 (C.A. 4): "... to deny the registrant equal access to the evidence upon which his case is determined is to reject our most basic concept of due process."

involved a weighty governmental interest, "the demands of an effective system for mobilizing the Nation's manpower in times of crisis," *Simmons v. United States, supra.* If the law in that area nonetheless gave substantial scope to due process concerns, it hardly seems appropriate to eschew any attempt in the parole field to strike a reasonable balance between conflicting needs.

(d) The right to consult with counsel in preparing for the hearing.

It is a *non sequitur* to assert that, because parole determinations are more the application of discretion than of law, prisoners have no need for lawyers in assisting them to obtain a favorable response. *Cf. Mempa v. Rhay,* 389 U.S. 128, 135. Former Federal Prisons Director James V. Bennett made the point with simplicity and authoritativeness:

> Of course the purpose of the parole hearing is not to retry the case in the technical sense of the term, and not to argue points of law and matters of that kind. Therefore for that purpose, counsel is not needed.
>
> But on the other hand, many . . . who have come before the Parole Board are tongue-tied; they are not able to present their views in a logical straightforward manner. Many . . . are ignorant, and they just cannot say anything much in their own behalf. Therefore it would be helpful if they did have the aid of some individual. . . .

American Law Institute, *Proceedings of the 33d Annual Meeting* 262 (1956). The conclusions of Paul W. Tappan, an equally respected penologist with many

years of experience in a State system, are in accord; they are set forth in the margin.[32] Nor is it likely that

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[32] [P]risoners often need counsel because of their own inadequacies. Many are of less than normal intelligence. Most of them approach parole hearings partially paralyzed by fear and anxiety. Few are able to express themselves fully and effectively, sometimes because of language difficulties. Certainly there is little or no relationship between the offender's ability to make a favorable impression and his actual readiness for release.

> Prisoners are generally quite ineffectual in organizing the information they should put to a parole board, important as the hearing is to them, and they have little talent for arguing to the board. To put it simply, they lack those qualities that are important to their success: qualities that are the peculiar strength of the effective advocate. For these reasons the counsel of an attorney may be quite invaluable in preparing and presenting a case to the board.
>
> ". . . More specifically, it is important that there be presented effectively to the paroling authority the positive aspects of an offender's case that are relevant to his parole, matters that may be quite inadequately elucidated in the institution's records and unknown to the board, and matters in particular that the offender could not easily himself present. For example, the writer, as a parole board member, has had brought more effectively to his attention by counsel than by most parole candidates, details relating to the prisoner's family and his relationships in the home, the quality of community feeling toward the offender, the victim's attitude, and other matters."

Tappan, *The Role of Counsel in Parole Matters,* The Practical Lawyer, Feb. 1957, at 26-27. See also Dressler, *Practice and Theory of Probation and Parole* 117 (2d ed. 1962); Kadish, *The Advocate and the Expert – Counsel in the Peno-Correctional Process,* 45 Minn. L. Rev. 783, 829 (1961) ("The usefulness of counsel in assisting the offender in insuring fullness and accuracy of the factual record, in presenting aspects and implications of the facts favorable to him, and in guarding against unfavorable implications, let alone rumor and overhasty conclusions, hardly seems debatable"); Stanley, *Prisoners Among Us: The Problems of Parole* 3-21 to -22 (pre-publication ed. 1975).

any substantial basis exists for the fear that counsel will somehow convert a parole hearing into a trial or (worse yet) a circus. Over 20 jurisdictions allow counsel to appear at a hearing, O'Leary & Nuffield, *A National Survey of Parole Decisionmaking*, 19 Crime and Delinq. 378, 386 (1973), and have presumably found means readily available to guard against abuse.[33]

Whether these considerations are sufficient to require a State to admit counsel to the hearing room is not, however, free from doubt. This Court's decision in *Gagnon v. Scarpelli*, 411 U.S. 778, rested on perceptions regarding the utility and effect of the presence of counsel in revocation proceedings, 411 U.S. at 786-88, which may be thought even less favorable to the right to counsel at release hearings, where the testimony of adverse witnesses is not required and there is not as specific an "accusatory" ingredient. At the same time, *Scarpelli* dealt with the right to appointed counsel, reserving the question whether the right to retained counsel was broader, *id* at 783 n.6. The

[33]See Feinberg, J., dissenting, in *Menechino v. Oswald*, 430 F.2d 403, 416 (C.A. 2): "[A]llowing retained counsel at a parole release hearing does not mean that he should be allowed to convert it into a trial any more than counsel could achieve such a result at a sentencing in court." *Cf.* the regulations of the United States Board of Parole:

> "Prisoners may be represented at hearings by a person of their choice. The function of the prisoner's representative shall be to offer a statement at the conclusion of the interview of the prisoner by the examiner panel, and to provide such additional information as the examiner panel shall request. . . . The presiding hearing examiner shall limit or exclude any irrelevant or repetitious statement."

28 C.F.R. §2.12. See also the remarks and motion of Whitney North Seymour, Esq., American Law Institute, *op. cit. supra*, at 258, 266.

present record does not permit informed consideration of the question whether it would be useful or apt to apply the "case-by-case" approach, laid down for the appointment of counsel in revocation proceedings by *Scarpelli, id.* at 788-91, to the admissibility of retained counsel to the hearing in release proceedings. Respondent asks the Court to defer consideration of the question of right to counsel at the hearing. *Cf. Morrissey v. Brewer*, 408 U.S. at 489.[34]

Access to counsel to assist in *preparing* for the hearing is, however, another matter entirely. Here, respondent submits, the balance of interests strongly favors the claim. While counsel may not be thought needed to "try the case," there can be little doubt that the average prisoner will often be unable to make adequate use of the notice afforded him. In part, this inability is a function of the anxiety and tension generated by the imminence of the hearing (see, *e.g.*, Dressler, *op. cit. supra*, at 117), and of the prison-induced passivity of the inmate, his lack of education, fluency and confidence (*cf. Johnson v. Avery*, 393 U.S. 483, 487); it is compounded by the very fluidity of the suitability-for-release determination, and the general lack of knowledge of its procedures and priorities. At a revocation hearing (like a sentencing proceeding), the prisoner has a relatively clear idea of what he did, or is

[34]Similarly, the question whether supporting "witnesses" must be heard in person should be deferred until the interests at stake can be made more fully known through litigation addressed to the issue. For a preliminary indication that such appearances are helpful to parole examiners as well as prisoners, see Beck, *Effect of Representation at Parole Hearings* 2,12-14 (U.S. Bd. of Parole Research Unit 1974).

charged with, that is likely to affect the result. Parole—as those opposing due process protections have repeatedly emphasized—is not focussed specifically on one or a few "accusations." Counsel, having "skills which the [prisoner] is unlikely to possess," *Gagnon v. Scarpelli*, 411 U.S. at 786, will often be able to sort out from the information known and supplied those items which may be erroneous or misleading or likely to be given too little or too much weight. Counsel can assist the prisoner in preparing for his own statement at the hearing, so that he is more likely to go there knowing what he wants to say and what issues he wants to address, and not merely enter the hearing room with the vague hope that through some magical process the board member or hearing officer will seem receptive to the notion of release or ask questions which the prisoner can answer.

At the same time, the State interests militating against the participation of counsel in the hearing room are inapplicable to preparatory consultation with the prisoner. Attorneys and visitors are permitted to meet with inmates, and no substantial State interest is intruded upon by provision of the opportunity to consult. We do not here contend that counsel must be appointed, *cf. Goldberg v. Kelly*, 397 U.S. at 270, but that such counsel or counsel-substitute as is available be given an adequate opportunity to have access to the material supplied to the prisoner, and to consult with him prior to the hearing. Such assistance may come from retained counsel, but may be available from other sources as well: It might come from a law school or legal services program which has chosen to assist prisoners at the institution in question; it might come from correctional staff members, or other inmates,

whom the institution permits to assist, and who choose to assist, prisoners in this way;[35] it might come from some other source. Of course, a prisoner would be entitled to be advised of the availability of the right of consultation, and of the presence of any source (such as a legal services program) which offers its services in that particular institution.

The opportunity to consult must be afforded sufficiently in advance of the hearing that the functions of counsel can be adequately discharged. This includes adequate time for counsel to review and digest the material, to discuss the case with the prisoner, and to advise him. It also includes a reasonable opportunity to consult court and other records to verify claims that the facts are inaccurately or incompletely set forth in the material to be presented to the examiner. In many cases, this verification will need to be done, or at least confirmed, by mail. Accordingly, several weeks will typically be the minimum period required.

(e) The right to an adequate statement of reasons for denial.

There is probably no aspect of the release decision-making process which has attracted more intense criticism than the failure to give the prisoner an indication of the reason why he is being continued in

[35] Respondent urges the Court to reserve, until it is more centrally presented, the question whether the Constitution permits correctional authorities to forbid an inmate from helping another in this situation. *Cf. Johnson v. Avery*, 393 U.S. 483; *Wolff v. McDonnell*, 418 U.S. 539, 579.

institutional custody.[36] Failure to give reasons serves no State interest save that of rushing on to the next case, and powerfully disserves the interest in enhancing the likelihood that discretion has been exercised responsibly and lawfully, on the basis of factually correct assumptions. *Cf. Wolff v. McDonnell*, 418 U.S. at 565. Beyond that, it requires a person whose notions of penology draw support more from the visions of Franz Kafka than the values of the Fourteenth Amendment and of our penological system[37] to discern the rehabilitative potential of refusing to tell a prisoner why he must remain a prisoner, and whether there is anything he can do to shorten his term. *Cf. Morrissey v. Brewer*, 408 U.S. at 484; Davis, *Discretionary Justice* 128 (1969).

To be adequate, a statement of reasons must sufficiently identify the conduct or factor relied on.

[36]As of 1972, forty jurisdictions did not record the reasons for the decision in their own records. O'Leary & Nuffield, *A National Survey of Parole Decision-Making*, 19 Crime and Delinq. 378, 385 (1973). There has probably been substantial change since then, as a result of legislative, administrative and judicial action. *E.g.*, Ch. 131, Laws of New York 1975, §1 (1975 McKinney's Session Law News 180) (N.Y. Correction Law, §214(6)); Ill. Ann. Stat. §38-1003-3-5; 28 C.F.R. §2.13(d); *Monks v. New Jersey State Parole Board*, 58 N.J. 238, 277 A.2d 193 (1971); *In re Sturm*, 11 Cal.3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974).

The complaint specifically alleges (para. 2(c)(6), App. 5) that no written statement of reasons is provided in North Carolina. This allegation must be taken as true in the present posture of the case, despite the assertion to the contrary in petitioners' brief (p.16 n.4).

[37]*E.g.*, the statements of policy in North Carolina parole statutes, No. Car. Gen. Stat. §§148-58, -60, and the federal statute and regulations, 18 U.S.C. §4203(a), 28 C.F.R. §2.18.

"Poor adjustment" or "bad risk" is obviously too vague and conclusory to have meaning, *cf. Haymes v. Regan*, 394 F.Supp. 711,714 (S.D.N.Y.), but an elaborate discussion is not required, so long as what is succinctly conveyed is sufficiently factual. Even such brief summaries as "three prior convictions," "five disciplinary violations," "lack of a post-release work plan," may suffice if the notice given prior to the hearing enables the prisoner to relate those phrases to discernible events or issues. Obviously, less laconic and routinized statements are less likely to trench on the border of meaninglessness.[38]

III.

IT IS AN UNCONSTITUTIONAL INTERFERENCE WITH A PRISONER'S RIGHT OF ACCESS TO THE COURTS FOR THE BOARD OF PAROLES TO BE SYSTEMATICALLY PROVIDED COPIES OF LEGAL PLEADINGS FILED BY APPLICANTS FOR PAROLE

Entirely apart from the issues of minimal procedural protection presented in the preceding section, respond-

[38]See the new requirements laid down by the U.S. Board of Parole, 28 C.F.R. §2.13(a), as amended, 40 F.R. 41332 (1975) (effective Oct. 6, 1975). Statements which simply track the language of general criteria for release or denial of release will seldom contain an intelligible reason for the conclusion that the criteria applied were deemed applicable in the particular case. *Cf. Craft v. Attorney General*, 379 F.Supp. 538, 540 (M.D. Pa.); *Candarini v. Attorney General*, 369 F.Supp. 1132, 1137 (E.D.N.Y.).

ent submits that the judgment of dismissal was in any event erroneous as to the challenge to the practice of including copies of legal pleadings (including petitions for *habeas corpus*) in the file provided to members or officials of the Board of Paroles considering individual cases (Complaint, para. 2(c)(3), App. 4).[39] It needs no argument to perceive the serious "chilling effect" which such a practice must necessarily have on a prisoner's right of access to the courts.[40] But "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Johnson v. Avery*, 393 U.S. 483, 485.

No legitimate State interest in advising Board members that an applicant is seeking judicial redress has been suggested, even on the assumption (*but cf. Johnson v. Avery, id.* at 486) that such an interest could override the right of access to court. Nor is it relevant that any person could examine the "public record" of an applicant's pleadings filed at the courthouse, as suggested by the District Court (App. 23). There is a world of difference between such a practice and the systematic channeling of this information by correctional authorities to parole board personnel. It is to the action of the correctional authorities, and not of the members or employees of the Board of Paroles, that this challenge is addressed.

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[39]This aspect of the case, although briefed on appeal, was not ruled on by the Court of Appeals, doubtless because the entire matter was remanded by it for trial and redetermination of the merits (Pet. 16).

[40]Indeed, the North Carolina parole statute expressly requires the Board to give consideration to the probability that the applicant "harbors no resentment against . . . the judge, prosecuting attorneys, or jury that convicted" him (No. Car. Gen. Stat. 148-60).

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be affirmed. Further, it would be appropriate for the Court to define with some specificity the minimum procedural protections to which respondent is entitled.

Respectfully submitted,

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September 1975

APPENDICES

A. Statutory Provisions

No. Car. Gen. Stat. §1-253 (1A Gen. Stats. N.C. (1969)):

§1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.—Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (1931, c. 102, s. 1.)

No. Car. Gen. Stat. §15-217 (1C Gen. Stats. N.C. (1975)):

§15-217. Institution of proceeding; effect on other remedies.—Any person imprisoned in the penitentiary, Central Prison, common jail of any county or imprisoned in the common jail of any county and assigned to work under the supervision of the State Department of Correction, who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to

collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, as to which there has been no prior adjudication by any court of competent jurisdiction, may institute a proceeding under this Article.

The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction, but, except as otherwise provided in this Article it comprehends and takes the place of all other common-law and statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment, and shall be used exclusively in lieu thereof. (1951, c. 1083, s. 1; 1957, c. 349, s. 10; 1959, c. 21; 1965, c. 352, s. 1; 1967, c. 996, s. 13.)

No. Car. Gen. Stat. §17-1 (1C Gen. Stats. N.C. (1975)):

§17-1. Remedy without delay for restraint of liberty.—Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed. (Const., art. 1, s. 18; Rev., s. 1819; C. S., s. 2203.)

No. Car. Gen. Stat. §148-58 (3C Gen. Stats. N.C. (1974)):

§148-58. Time of eligibility of prisoners to have cases considered.—All prisoners shall be eligible to have their cases considered for parole when they have

served a fourth of their sentence, if their sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate; provided, that any prisoner serving sentence for life shall be eligible for such consideration when he has served 10 years of his sentence. Nothing in this section shall be construed as making mandatory the release of any prisoner on parole, but shall be construed as only guaranteeing to every prisoner a review and consideration of his case upon its merits. (1935, c. 414, s. 8; 1955, c. 867, s. 5.)

No. Car. Gen. Stat. §148-60 (3C Gen. Stats. N.C. (1974)):

§148-60. Time for release of prisoners discretionary.—The time of releasing each prisoner eligible for consideration for parole as provided for herein shall be discretionary, and due consideration shall be given to the reasonable probability that the prisoner will live and remain in liberty without violating the law; that the release of the prisoner is not incompatible with the welfare of society, and that the record of the prisoner during his confinement established that the prisoner is obedient to prison rules and regulations, and has shown the proper respect for prison officials, and due regard and consideration for his fellow prisoners; and that the prisoner harbors no resentment against society or the judge, prosecuting attorneys, or jury that convicted the prisoner. (1935, c. 414, s. 10.)

B. Guidelines for Parole Release Considerations, U.S. Board of Parole (28 C.F.R. §2.20, as amended, 40 F.R. 41334, 41337 (1975)):

[Guidelines for decisionmaking, customary total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
Low				
Immigration law violations Minor theft (includes larceny and simple possession of stolen property less than $1,000). Walkaway	6 to 10 mo.	8 to 12 mo.	10 to 14 mo.	12 to 16 mo.
Low Moderate				
Alcohol law violations Counterfeit currency (passing/possession less than $1,000). Drugs marihuana, simple possession (less than $500) Forgery/fraud (less than $1,000) Income tax evasion (less than $10,000) Selective Service Act violations Theft from mail (less than $1,000)	8 to 12 mo.	12 to 16 mo.	16 to 20 mo.	20 to 25 mo.
Moderate				
Bribery of public officials Counterfeit currency (passing/possession $1,000 to $19,999). Drugs: Marihauna, possession with intent to distribute/sale (less than $5,000). "Soft drugs", possession with intent to distribute/sale (less than to $5,00) Embezzlement (less than $20,000) Explosives, possession/transportation Firearms Act, possession/purchase/sale (single weapon—not sawed-off shotgun or machine gun). Income tax evasion ($10,000 to $50,000) Interstate transportation of stolen/forged securities (less than $20,000). Mailing threatening communications Misprision of felony Receiving stolen property with intent to resell (less than $20,000). Smuggling/Transporting of Aliens Theft/forgery/fraud ($1,000 to $19,999) Theft of motor vehicle (not multiple theft or for resale).	12 to 16 mo.	16 to 20 mo.	20 to 24 mo.	24 to 30 mo.

High	
Burglary or larceny (other than embezzlement) from bank or post office. Counterfeit currency (passing/possess $20,000-$100,000). Counterfeiting (manufacturing) Drugs: Marihuana, posession with intent to distribute/sale ($5,000 or more). "Soft drugs", possession with intent to distribute/sale ($500 to $5,000) Embezzlement ($20,000 to $100,000) Firearms Act, possession/purchase sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Interstate transportation of stolen/forged securities ($20,000 to $100,000). Mann Act (no force commercial purposes) Organized vehicle theft Receiving stolen property ($20,000 to $100,000) Theft/forgery/fraud ($20,000 to $100,000)	16 to 20 mo. - 20 to 25 mo. - 26 to 32 mo. - 32 to 38 mo.
Very High	
Robbery (weapon or threat) Drugs: "Hard drugs" (possession with intent to distribute sale) [no prior conviction for sale of "hard drugs"]. "Soft drugs", possession with intent to distribute/sale (over $5,000) Extortion Mann Act (force) Sexual act (force)	26 to 36 mo. - 36 to 45 mo. - 45 to 55 mo. - 55 to 65 mo.
Greatest	
Aggravated felony (e.g. robbery, sexual act, aggravated assault) weapon fired or personal injury. Aircraft hijacking Drugs: "Hard drugs" (possession with intent to distribute/sale) for profit [prior conviction(s) for sale of "hard drugs"]. Espionage Explosives (detonation) Kidnapping Willful homicide	(Greater than above, however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)

NOTES

1. These guidelines are predicated upon good institutional conduct and program performance.
2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
4. If an offense behavior involved multiple separate offenses, the severity level may be increased.
5. If a continuance is to be given, allow 30 d (1 mo) for release program provision.
6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes.

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SALIENT FACTOR SCORE

Case name _____ Register No _____

Item A . . . . . □
- No prior convictions (adult or juvenile) = 2
- One or two prior convictions = 1
- Three or more prior convictions = 0

Item B . . . . . □
- No prior incarcerations (adult or juvenile) = 2
- One or two prior incarcerations = 1
- Three or more prior incarcerations = 0

Item C . . . . . □
- Age at first commitment (adult or juvenile) 18 years or older = 1
- Otherwise = 0

Item D . . . . . □
- Commitment offense did not involve auto theft = 1
- Otherwise = 0

Item E . . . . . □
- Never had parole revoked or been committed for a new offense while on parole = 1
- Otherwise = 0

Item F . . . . . □
- No history of heroin or opiate dependence = 1
- Otherwise = 0

Item G . . . . . □
- Has completed 12th grade or received GED (prior to this commitment) = 1
- Otherwise = 0

Item H . . . . . □
- Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community = 1
- Otherwise = 0

Item I . . . . . □
- Release plan to live with spouse and/or children = 1
- Otherwise = 0

Total score . . . . . □

Supreme Court, U. S.
FILED
AUG 26 1975
MICHAEL RODAK, JR., CLERK

No. 74-1287

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT WEINSTEIN, ET AL., PETITIONERS

v.

HOWARD E. BRADFORD, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1287

ROBERT WEINSTEIN, ET AL., PETITIONERS

v.

HOWARD E. BRADFORD, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will discuss the question whether a prisoner's application for parole implicates the procedural protections of the Due Process Clause.[1]

[1] Petitioners also contend that a federal court lacks jurisdiction over a prisoner's challenge to the constitutionality of state parole consideration procedures, where that challenge has not first been made in and rejected by the state's courts. We express no view on that question.

INTEREST OF THE UNITED STATES

This case involves the question whether a prisoner's application for parole, during a period of eligibility, implicates the procedural protections of the Due Process Clause. For the reasons that we discuss below, we believe that a prisoner's unilateral expectation that the Board will exercise its discretion in his favor is neither a "liberty" nor a "property" interest within the meaning of that Clause, and consequently that the responsibility for evaluating and implementing the procedures to be followed in considering applications for parole is entrusted to the provinces of the federal and state legislatures and executives. A contrary decision by this Court would affect the constitutional context in which the federal parole system operates.

1. The United States maintains an extensive parole system. In fiscal 1973, the last year for which figures are available, the United States Board of Parole made 8,672 final parole decisions concerning adult prisoners, and granted parole in 4,576, or slightly more than half, of the cases. United States Board of Parole, 1972-1973 Annual Report, p. 19.

Under the Board's regulations (28 C.F.R. Part 2, 39 Fed. Reg. 45223) a prisoner's application for parole is accorded substantial procedural protection. Application forms are provided to each prisoner eligible for parole. Although the regulations do not require a hearing on every application, we are informed by the Board that hearings are granted as a matter of course. The petitioner is given written notice of the time and place of the hearing and is entitled to be represented at the hearing by a person of his choice, who may offer a statement at the conclusion of the interview of the prisoner and provide such additional information as the examining panel may request.

The initial parole hearing is conducted by a panel of two examiners designated by the Board. The panel informs the prisoner of the decision and, if parole is denied, of the reasons therefor. The factors considered in acting on an application for parole include the prisoner's sentence, the facts relating to his offense, his prior criminal record, his personal and social history and institutional experience, changes in his motivation and behavior, and his release plans. The Board has prescribed objective guidelines indicating the customary range of time to be served before release for various combinations of these factors. If parole is denied, the prisoner is furnished in most cases with a "guideline evaluation statement," which sets forth the factors upon which the Board relied and shows the Board's evaluation of those factors in the prisoner's case.

The prisoner may appeal an adverse panel decision to the Regional Director. The prisoner may not appear at the appellate hearing, but attorneys, relatives, and other interested parties may appear at the discretion of the Director. The Regional Director's decision can be appealed to the National Appellate Board. The National Appellate Board's decision is final.

2. These parole procedures are unlikely to be directly affected by the outcome of this case. The interest of the United States in this case is more general: to defend the prerogatives of Congress and the Executive to reconsider, determine, and implement the procedures that govern consideration of applications for parole. Current statutes delegate absolute direction to the Attorney General to decide whether a prisoner shall be paroled. See 18 U.S.C. 4202 and 4203. The Board's present hearing and release guidelines and procedures were developed by the Board after a careful three-year study conducted by the National Council on Crime and Delinquency and an analysis of the results of a pilot project begun in October 1972 in one of the Board's regions. If this Court should hold that the Due Process Clause governs consideration of applications for parole, future experimentation and alteration of the same kind could be hindered or precluded. Moreover, Congress is now considering making substantial changes in the parole system. H.R. 5727, passed by the House on May 21, 1975, has been sent to the Senate Committee on the Judiciary, where hearings are scheduled for it and for S. 1109.[2] The power of Congress to

[2] H.R. 5727 would abolish the Board of Parole and create a "United States Parole Commission" independent of the Department of Justice. The bill provides that any prisoner would be eligible for parole after one-third (or ten years, whichever comes first) of his sentence, and that the prisoner "shall" be released at the earliest release date unless an examining panel determines that one or more specified reasons for denying parole exists. H.R. 5727 also provides that each inmate shall be afforded a personal hearing, at least yearly on and after his earliest release date, at which he shall be entitled to present evidence and be represented by an advocate; the Commission must make available to the prisoner any file or report used in making its decision. A record of the hearing would be kept, and the prisoner furnished a written notice "stating with particularity the grounds on which its determination" not to grant parole was based. The bill deals with numerous other matters touching on parole, including the rulemaking power of the Commission, the conditions that may be attached to parole, early release from parole, revocation of parole, administrative appeals, and so on.

S. 1109 also would create a "United States Parole Commission." Any prisoner would be eligible for parole after one-third (or fifteen years, whichever comes first) of his sentence, and "may" be released then or later, as the Commission finds appropriate. Each inmate would be afforded a hearing at least every other year on and after his earliest release date, at which he would be entitled to present evidence and be represented by an advocate. The prisoner would have reasonable but limited access to progress reports and other materials upon which the Commission might rely. A record of the hearing would be kept and the prisoner informed of the reasons for any determination denying parole or imposing unusual conditions on a grant of parole. Like H.R. 5727, S. 1109 deals with related subjects touching on parole grants and revocation.

make changes in the parole system could be substantially affected by the outcome of this case.

Moreover, many other types of decisions affecting prisoners, such as those concerning eligibility for work-release programs and furloughs, involve opportunities for prisoners to acquire some "conditional liberty" at the discretion of penal authorities. Similarly, many decisions that do not involve a temporary release from incarceration may nevertheless involve greater liberty within the institution—decisions relating to placement, security classification, and work

assignments are but a few of many examples.[3] The Court's resolution of the question presented here could have significant implications for the institutional handling of such "housekeeping" decisions.

STATEMENT

North Carolina allows each prison inmate to apply for parole upon completion of a minimum portion of his sentence (Pet. App. 12). State law commits the decision whether to grant parole to the discretion of the North Carolina Board of Paroles. See N.C. Gen. Stat. §§ 148-58, 148-60 (1974). The Board of Paroles has not bound itself by express rules or guidelines to grant parole in any particular case; it retains discretion over all applications, and no specific set of facts will entitle an individual to be paroled. See *Goble* v. *Bounds*, 281 N.C. 307, 188 S.E. 2d 347; *Jernigan* v. *State*, 10 N.C. App. 562, 179 S.E. 2d 788.

The first review of an inmate's application for parole is conducted by a professional case analyst, who studies the inmate's record and prison file and recommends a disposition. The case analyst's recommendation and the applicant's file are reviewed by the

[3] See *Montanye* v. *Haymes*, No. 74-520, certiorari granted, June 30, 1975 (institutional placement); *Catalano* v. *United States*, 383 F. Supp. 346 (D. Conn.) (security classification on initial placement); *United States ex rel. Myers* v. *Sielaff*, 381 F. Supp. 840 (E.D. Pa.) (application for discretionary furlough); *Clonce* v. *Richardson*, 379 F. Supp. 338 (W.D. Mo.) (placement in therapy program within institution).

Parole Commission; any Commissioner may set the application for a hearing before a single Commissioner. In most cases, however, parole is either granted or denied without a formal hearing. An inmate who is denied parole is furnished a reason for the action and is entitled to submit additional material to support his application. See Pet. Br. 16-17, n. 4.

Respondent is an inmate in the North Carolina state prison system who was considered for and denied parole without a formal hearing (A. 19). On March 2, 1973, respondent and Robert E. Harris, a North Carolina prisoner also denied parole, brought a class action under 42 U.S.C. 1983, asserting that the State had not used constitutionally adequate procedures in considering their parole applications; they claimed that they should have been afforded a hearing on their applications, given access to or opportunity to comment on any adverse information that was considered in denying their applications, and advised of the reasons for the denials (A. 2-16). The district court refused to certify the case as a class action and denied the individual claims for declaratory and injunctive relief (A. 17-25).[4]

[4] There is a substantial question whether this case should have been heard by a three-judge district court. The complaint (A. 2-16) sought injunctive relief against the actions of the Board of Paroles, an agency of statewide jurisdiction whose practices, which are apparently authorized by state law, apply statewide. See 28 U.S.C. 2281. Cf. *Wolff* v. *McDonnell*, 418 U.S. 539, 542, n. 1; *Board of Regents* v. *New Left Education Project*, 404 U.S. 541. The fact that those practices are

The district court held that the Due Process Clause does not apply to the consideration of applications for parole (A. 22). The court distinguished parole revocations from parole grants (*ibid.*):

> [A] parole revocation proceeding differs from a review by a parole board to determine whether an inmate should be paroled initially. In the former proceeding, the determination is whether the conditional freedom of the parolee should be terminated because of an alleged violation of the conditions of his parole. In a review to decide whether parole should be granted, the determination is whether an inmate is a suitable prospect for return to society.

A divided panel of the court of appeals reversed. The court held that prisoners have an "inchoate privilege" (Pet. App. 14) amounting to "liberty" in the prospect of being paroled and that the denial of parole without some incidents of due process constitutes a "grievous loss" (Pet. App. 14-15). The court did not state what procedural protections might be required but remanded to the district court to consider the matter in the first instance.

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not embodied in formal regulations would not appear to affect the jurisdictional question. See *Sands* v. *Wainwright*, 491 F. 2d 417, 427-429 (C.A. 5) (*en banc*), certiorari denied *sub nom. Guajardo* v. *Estelle*, 416 U.S. 992; *Gilmore* v. *Lynch*, 400 F. 2d 228 (C.A. 9), certiorari denied, 393 U.S. 1092. Cf. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290, 292. But cf. *Phillips* v. *United States*, 312 U.S. 246. See generally Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1 (1964).

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals' opinion reflects the understanding that parole release decisions are of great importance in the life of a prisoner, and the belief that it is concomitantly important that such decisions be made only after studied deliberations and hearings calculated to minimize the chance that a denial of parole will be based upon misapprehensions of fact or mistaken judgment. There is much to be said for that view, and the federal Board of Parole now provides hearings calculated to solicit the views of prisoners and to keep them informed of the standards by which decisions will be made and the reasons for the decision in their particular case.

The result reached by the court of appeals therefore may accord with "enlightened public policy." But the question here is not the wisdom of the result but rather whether the task of defining and implementing "enlightened public policy" with regard to parole proceedings is vested by the Constitution in the legislative and executive branches, or rather in the courts under the Due Process Clause. That hearings or other formal procedures may improve the comprehensiveness and accuracy of a parole board's fact-gathering and decisionmaking functions does not answer this question, for there is no abstract constitutional right to be free of procedures that entail significant risks of error. Due process rights are implicated only when a constitutionally protected interest in liberty or property is at stake.

Legislatures and administrators, as well as courts, strive to be sensitive to the needs and desires of prison inmates. Congress is considering major changes in the federal parole system (see note 2, *supra*) and, over a lengthy period of investigation and experimentation, the federal Board of Parole has devised procedures, including a personal hearing, that it believes strike a fair balance between the legitimate interests of the inmates and the needs and objectives of the institution. North Carolina has adopted different procedures, calculated to "filter out" the vast majority of cases in which a personal hearing is quite unlikely to affect the parole decision. As more is learned about the results of the procedures now in use, or as ideas concerning the role of prisons in our society evolve, still other procedures may come to appear superior to those now in use. We believe the choice of procedures is constitutionally within the province of the legislature and the executive, which have the better opportunity to study the procedures in use and evaluate their merits and demerits.

Over the past several decades, society's views with regard to penology have undergone a sweeping revolution; many experts view rehabilitation as the ultimate objective of incarceration, and the court of appeals apparently agrees with this assessment (Pet. App. 15). If that is in fact the system's objective, then perhaps the parole board should be held accountable to the prisoner for its actions, as the court of appeals thought, for it may be that this would aid the rehabilitative process.

But the court's empirical assessment of the effect of applying the Due Process Clause to parole release decisionmaking may have been mistaken; it is not inconceivable that rehabilitation is fostered if the inmate must justify his actions to corrections officials and if they have essentially discretionary authority to offer inducements and rewards for proper behavior. If the prisoner is permitted to assume the role of an advocate in an adversarial struggle to "prove" that he does not "belong" in prison, he may lose sight of the fact that the goal of the rehabilitative ideal is to impress upon him the fact that he has erred and should not repeat the transgression.

We do not know which model of the rehabilitative process is more likely to be correct; indeed, social science research is barely adequate to enable us to frame the question. The needed knowledge can be acquired, if at all, only by a painstaking process of experimentation, change, trial, and error, similar to that in which the federal Board of Parole is now engaged. What is more, perceptions of the role of imprisonment itself can be expected to change (compare Wilson, *Thinking About Crime* (1975), with Morris, *The Future of Imprisonment* (1974)) and, as these perceptions change, our ideas about the proper role of parole and the proper way to go about deciding when to grant parole may change with them.[5] Decisions on these questions are best left to

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[5] As Judge Friendly has pointed out, there is nothing either suspect or improper—except a poor choice of name—about the "inquisitorial" method of investigating cases and making

society at large and to the representatives they elect, unless the Constitution requires otherwise. We do not believe it does in this case.

A. Respondent's claim to more elaborate parole procedures rests upon the Due Process Clause of the Fourteenth Amendment. But that Clause applies only in those circumstances where governmental action threatens to deprive an individual of "liberty" or "property." Thus the evaluation of respondent's claim must begin with an inquiry into whether the denial of parole deprives respondent of a constitutionally protected liberty or property interest.

B. Denial of parole does not deprive a prisoner of liberty. He was deprived of his liberty upon conviction, sentence, and incarceration. The prisoner who applies for parole stands in no danger of losing liberty; to the contrary, liberty is what he seeks. An adverse decision will merely continue him in his constitutionally valid non-free condition.

Certainly a prisoner has an "interest" in securing his release on parole. But that interest is not constitutionally cognizable as a "liberty" interest. The loose constellation of constitutionally based values that underlies the analysis of claims of "liberty" interests in non-prisoner cases does not, by and large,

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decisions. That method, which North Carolina has adopted, may be better suited to classes of cases involving "mass justice" than is the adversarial model, involving as it does substantial quantities of person-to-person argumentation. See Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1289-1291 (1975).

pertain to persons lawfully confined. A prisoner's interests relating to release are founded not on constitutional concepts of liberty but on the statutes, regulations, and rules that govern the terms of his confinement. At least where the question relates only to release and not to conditions of confinement, a prisoner has no constitutionally protected liberty interest apart from his legitimate claims of entitlement under those statutes, regulations, and rules.

This Court's decisions make clear that a legitimate claim of entitlement warranting the procedural protections of due process exists only when the State has bound itself to take, or refrain from taking, specified actions on the basis of determinable facts. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

It is likewise clear that a legitimate claim of entitlement arises only from positive law and not from the individual's unilateral expectation.

C. Under North Carolina law, the decision whether to grant or deny parole is completely discretionary. No set of facts respondent could prove or attempt to prove would entitle him to parole. Because the decision whether to grant parole is not determined by any particular controvertible facts but instead is discretionary, respondent could under no circumstances

have a legitimate claim of entitlement to release on parole. Accordingly, respondent has no constitutionally protected liberty or property interest in being released. Respondent's only "interest" is a hope or expectation of release. But the Constitution does not require that any particular procedures be used by the State before it acts to disappoint an individual's unilateral expectations.

ARGUMENT

A PRISONER'S APPLICATION FOR PAROLE DOES NOT IMPLICATE THE PROCEDURAL PROTECTIONS OF THE DUE PROCESS CLAUSE

The court of appeals recognized that the protections of the Due Process Clause of the Fourteenth Amendment extend only to those occasions on which the government is seeking to deprive an individual of "liberty" or "property." The court also recognized "that no prisoner ever acquires a right to earlier release; at most he has a right only to be *considered* for earlier release and a *privilege*, which may be withheld, to be *granted* it" (Pet. App. 13; emphasis in original). The court further, and correctly, observed (Pet. App. 14):

> [T]here is no present liberty at stake. There is only the right to be considered for parole and the inchoate privilege of some earlier future release if the parole board, in its discretion, concludes to grant it.

But even though the court recognized that the prisoner's only right is to be considered for early release (a right of purely statutory origin), it held that the mere hope for, or unilateral expectation of, release was itself a "liberty" interest, of which the prisoner could not be "deprived" without due process of law. As we now show, the court erred in its analysis of this expectancy interest.

A. The Procedural Protections Of The Due Process Clause Apply Only To Proceedings That May Result In The Deprivation Of An Individual's "Liberty" Or "Property"

The procedural protections of the Due Process Clause do not extend generally to all situations in which governmental action or inaction may be adverse to the interests of a particular individual or group. By its terms, that Clause applies only in those circumstances where governmental action threatens to deprive an individual of "liberty" or "property."[a] Accordingly this Court, in evaluating claims of entitlement to the procedural protections of due process. has been scrupulously careful to identify the nature of the particular substantive interests at stake.

Perhaps the paradigm is *Board of Regents* v. *Roth*, 408 U.S. 564. Roth had been hired for an academic year by Wisconsin State University; the University declined to renew his contract and Roth brought suit, claiming that he was entitled to notice of charges and a hearing on the nonrenewal. The

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[a] We need not here discuss the special situation in which the governmental action threatens to deprive the individual of his life.

Court agreed with Roth that he possessed an "interest" in continued employment, in the sense that termination of employment is a "grievous loss." But that fact, the Court held, was not determinative of the due process question (408 U.S. at 570-571; emphasis in original):

> [T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. * * * We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

The Court then determined that Roth's interest in continued employment, *i.e.*, his desire to obtain a renewal of his contract, was neither a "liberty" nor a "property" interest, and therefore that he could be deprived of that interest without due process.

The *Roth* decision illustrates that although "grievous loss" may be a necessary prerequisite to the invocation of due process protections, it is not a sufficient one: the substantiality of an interest is not determinative of whether that interest is entitled to due process protection. Thus the fact that a prisoner's "interest" in being released on parole is concededly substantial cannot be dispositive of the due process claim in this case. To the contrary, as *Roth* further demonstrates, the evaluation of any due process claim must begin with an inquiry into whether the interest of which the individual may be deprived is a constitutionally cognizable liberty or property interest. See also *Arnett* v. *Kennedy*,

416 U.S. 134. It is to that inquiry that we now turn.

B. Except To The Extent That He May Have A Legitimate Claim Of Entitlement Grounded In The Statutes, Regulations, Or Rules Governing The Terms Of His Confinement, A Prisoner Has No Constitutionally Cognizable Interest In Being Released On Parole

It may at first blush appear paradoxical to assert that a prisoner has no constitutionally cognizable "liberty" interest in being released from confinement on parole. This is so because the most elementary form of liberty, freedom from the state's physical control of the person, is at stake in the parole decision. But the question under the Constitution is whether an adverse parole decision "deprives" the prisoner of liberty. The answer, we believe, is that it does not.

A defendant who has been convicted of a crime, sentenced to imprisonment, and confined pursuant to that sentence has, in a very basic sense, lost his "liberty" for the period of his sentence: the sentence of imprisonment lawfully places him under the physical control of the State for the period prescribed. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U.S. 266, 285. This is not necessarily to say that a prisoner retains no constitutionally cognizable liberty interests at all. Cf. *Procunier* v. *Martinez*, 416 U.S. 396. See generally *Wolff* v. *McDonnell*, 418 U.S. 539,

555-556. Cf. *Montanye* v. *Haynes*, *supra*. What we do contend here is that a prisoner, while incarcerated, has no constitutionally cognizable "liberty" interest in release from confinement prior to the expiration of his sentence, for it is specifically that interest of which he has been constitutionally deprived by his conviction and sentence.

The prisoner is "deprived" of nothing further by the decision denying parole. The prisoner who applies for parole stands in no danger of losing liberty; he is, to the contrary, seeking liberty. An adverse decision merely continues the prisoner in his non-free condition; it does not worsen that condition. This, we believe, fully distinguishes the denial of parole from its revocation. At a parole revocation proceeding, the parolee attempts to defend his liberty, albeit conditional, against those who would take it from him; an adverse determination ends the parolee's freedom and thus "deprives" him of "liberty" within the meaning of the Due Process Clause. *Morrissey* v. *Brewer*, 408 U.S. 471, 480-482. See also *Gagnon* v. *Scarpelli*, 411 U.S. 778. A prisoner seeking parole has no similar constitutionally protected "liberty" interest in the parole board's decision; he is not at liberty, he has no constitutional liberty interest (at least in the form of release from prison), and he does not stand to lose any liberty as a result of that decision.

This Court's decision in *Wolff* v. *McDonnell*, *supra*, is not to the contrary. The question in *Wolff* was whether the protections of due process extend to

prison disciplinary proceedings that may result in the reduction of a prisoner's statutory good-time credits. This Court held that the protections of due process do apply to such proceedings. But the Court's decision did not turn upon the mere fact that a reduction in good-time credits might affect the timing of the prisoner's release, *i.e.*, it did not turn upon a simple identification of release from prison with constitutionally protected liberty. Instead, the Court focused narrowly on the nature and source of the prisoner's interest in the retention of his accumulated good-time credits. Since that interest was created by statute, and by statute could be extinguished only "[i]n cases of flagrant or serious misconduct" (418 U.S. at 546), the Court determined that "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated" (418 U.S. at 557).

This approach, which would appear necessarily applicable here as well, avoids reference to or reliance upon the loose constellation of constitutionally based values that underlie the analysis of claims of "liberty" interests in non-prisoner cases. See, *e.g.*, *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 572; *Meyer* v. *Nebraska*, 262 U.S. 390, 399. The Court's analysis in *Wolff* implicitly recognizes that such values do not, in the main, pertain to persons lawfully confined. A prisoner's interests relating to re-

lease are founded not in constitutional concepts of liberty but in the statutes, regulations, and rules that govern the terms of his confinement. In other words, a prisoner has no constitutionally protected interest in release from confinement, except to the extent that those statutes, regulations, and rules create a positive right to release.

Accordingly, although a prisoner's interests in release from confinement may for purposes of convenience be called "liberty" interests, as in *Wolff*, they are in fact nothing more than "property" interests in disguise, *i.e.*, entitlements created by nonconstitutional sources of positive law.[7] As the decision in *Wolff* indicates, a prisoner's interests relating to release must be analyzed in "property" terms; the question in each case must be whether the State has extended to the prisoner a claim of entitlement that warrants procedural protection against unlawful divestment.

In short, our position here is that, whatever the scope of Fourteenth Amendment "liberty" interests in other contexts, a prisoner's interest relating to release from confinement, to be constitutionally entitled to the procedural protections of due process, must

[7] Indeed, this may also be true with respect to a parolee's interest in retaining his freedom. In *Morrissey* v. *Brewer*, *supra*, a case that purportedly turned upon the parolee's "liberty" interest, the right of which the parolee would be deprived by wrongful revocation was in fact a statutorily-created "property" interest, *i.e.*, the entitlement to remain at large unless and until it was demonstrated that he had violated the terms of his parole.

rest upon a legitimate claim of entitlement grounded in the statutes, regulations or rules governing the terms of his confinement. Thus the analysis to be applied here must be similar to that employed by this Court in recent decisions involving the assertion of property interests.

Those decisions make clear that a constitutionally cognizable property interest arises only when the condition limiting the Executive's freedom of action exists in positive law and not merely in the hopes or expectations of the individual. This Court in *Roth* explicitly rejected the argument that such a property interest could arise merely from the individual's need, desire, or expectation (408 U.S. at 577):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

A legitimate claim of entitlement exists only when the state has bound itself, either by statute, regulation, rule, or well-settled course of practice, to take, or refrain from taking, specified actions on the basis of determinable facts. So, for example, in *Goss v. Lopez*, 419 U.S. 565, the student had a statutory right to attend school unless he was guilty of misconduct; in *Arnett* v. *Kennedy*, *supra*, the employee could be terminated only for cause; in *Perry* v. *Sindermann*, 408 U.S. 593, the teacher asserted a well-settled practice of reemployment absent "sufficient

cause." See also *Goldberg* v. *Kelly*, 397 U.S. 254. Where the State has bound itself to extend or confer a benefit, or withhold a sanction, upon the determination of a particular set of facts, the Due Process Clause requires the implementation of procedures designed to ensure that the determination of those facts will be made fairly and accurately. Cf. *Richardson* v. *Perales*, 402 U.S. 389, 401-402.

On the other hand, where the State has not so bound itself, there can be no legitimate claim of entitlement. In *Board of Regents* v. *Roth*, for example, the University had discretion not to reemploy the teacher, and no set of facts he could prove would entitle him to reemployment. See also *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886. When there is no determinable set of facts that could give rise to an entitlement, the process of determining the facts cannot result in the deprivation of any entitlement; in such circumstances, the procedural protections of due process are not implicated. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

We turn, therefore, to an application of these principles to the facts of this case.

C. Respondent Has No Legitimate Claim Of Entitlement To Release On Parole

North Carolina law provides the Board of Paroles with discretion to grant or deny parole; the parole decision is to be made not on the basis of any objective facts, but on the basis of the predictions the Board may be able to make about the prisoner's ability to live peacefully in the larger society. N.C. Gen. Stat. § 148-60. See also 18 U.S.C. 4203. The decision to grant or deny parole is a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 813 (1961). No particular fact or set of facts is determinative, nor could it be, for although facts are surely important to the parole release decision, the ultimate question involves an assessment of the prisoner's character. There is no fact or set of facts that a prisoner can prove that will establish his entitlement to have the Board place trust in his character. In short, no set of facts that respondent could prove or attempt to prove would entitle him to parole. Because the decision whether to grant parole is not determined by any particular controvertible facts, but instead is entrusted to the discretion of the Board, respondent has no liberty or property interest in being released on parole.

We do not argue that no constitutionally protected interest is involved in the parole process. Under

North Carolina law, respondent has a legitimate claim of entitlement to be considered for parole. North Carolina "guarantee[s] to every prisoner a review and consideration of his case upon its merits." N.C. Gen. Stat. § 148-58. The State may not withdraw or deprive a prisoner of that right without due process. But respondent does not contend that he (or members of his class) has been denied consideration for parole. Moreover, the fact that respondent was entitled to consideration does not, standing alone, entitle him to any particular procedures upon consideration. Neither statute, regulation, rule, nor course of practice establishes any more elaborate procedures upon consideration than respondent's case was accorded. Respondent therefore has no entitlement apart from the Due Process Clause to more elaborate procedures. And since the grant of parole upon consideration is a discretionary decision not turning upon provable facts, the Due Process Clause itself does not apply.[8]

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[8] The majority of the courts of appeals to consider the question have agreed that the Due Process Clause does not apply to applications for parole, at least in the absence of a statute or regulation creating an entitlement to parole subject to defeasance only upon certain facts. See *Scarpa* v. *United States Board of Parole*, 477 F. 2d 278 (C.A. 5) (*en banc*), vacated as moot, 414 U.S. 809; *Farries* v. *United States Board of Parole*, 484 F. 2d 948 (C.A. 7); *Mosley* v. *Ashby*, 459 F. 2d 477 (C.A. 3); *Madden* v. *New Jersey State Parole Board*, 438 F. 2d 1189 (C.A. 3).

Two courts of appeals (in addition to the court below) have held that the expectation of parole release is a "conditional liberty" that cannot be denied without procedural protections. *Childs* v. *United States Board of Parole*, 511 F. 2d 1270 (C.A.D.C.); *United States ex rel. Johnson* v. *Chairman of New York State Board of Parole*, 500 F. 2d 925 (C.A. 2), vacated as moot, 419 U.S. 1015.

A closely related question is whether the setting of a tentative parole release date establishes a "liberty" interest so that hearings are required before the date can be altered. Compare *Sexton* v. *Wise*, 494 F. 2d 1176 (C.A. 5) (no liberty interest until actual release date) and *McIntosh* v. *Woodward*, 514 F. 2d 95 (C.A. 5) (same), with *Jackson* v. *Wise*, 390 F. Supp. 19 (C.D. Cal.) (setting of tentative release date creates a liberty interest).

We do not quarrel with the court of appeals' observation that prisoners may experience a "grievous loss" upon being denied parole. But the loss in question stems not from the deprivation of an entitlement, but rather from the disappointment of an expectation. The loss results not because the State's actions were unauthorized, but merely because those actions did not meet the "unilateral expectations" respondent had self-generated. As the *Roth* decision teaches, such a loss does not amount to the deprivation of a constitutionally protected interest: the Constitution does not require that any particular procedures be used by the State before it acts to disappoint an individual's unilateral expectations.[9]

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[9] Indeed, in the last analysis this case is indistinguishable from *Roth*. Respondent's argument, at bottom, appears to be: "Prisoners have a right to be considered for parole. If my application for parole had been granted, I would have acquired a constitutionally protected interest in remaining at liberty, for under statute I could not be reimprisoned without due cause. Therefore I have a constitutionally protected interest in the possibility of receiving parole, and the parole board must comply with the requirements of due process before it

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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denies my application." This argument appears identical to the one rejected in *Roth*. The teacher's argument there was: "Teachers have a right to be considered for employment in the next academic year. If my contract had been renewed, I would have had a constitutionally protected interest in my employment, because under the contract I could not be fired without due cause. Therefore I have a constitutionally protected interest in the possibility of renewal, and the university must comply with the requirements of due process before it decides not to renew my contract." The weakness in those arguments lies in the "therefore." The liberty or property interest arises only when the contract is renewed, only when the prisoner is granted parole. It does not arise before. The "therefore," which relates to the period before the protected interest arises, is merely a verbal bridge lacking any logical foundation.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 591226 25

Supreme Court, U. S.
FILED
SEP 23 1975
MICHAEL RODAK, JR., CLERK

No. 74-1287

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OCTOBER TERM, 1975

ROBERT WEINSTEIN, ET AL.,
Petitioners

v.

HOWARD E. BRADFORD, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILIARLY SITUATED

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF JEROME N. FRANK LEGAL SERVICES ORGANIZATION AND THE FEDERAL PLAINTIFF CLASS IN *CHILDS* v. *UNITED STATES BOARD OF PAROLE*, 511 F.2d 1270 (D.C. CIR. 1974) AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The Jerome N. Frank Legal Services Organization (LSO) is the clinical legal education program of the Yale Law School. LSO coordinates student legal assistance programs for individuals who cannot obtain quality legal services, including mental patients at

Connecticut Valley Hospital and prisoners at Connecticut Correctional Institution for Women and Danbury Federal Correctional Institution. In LSO's Danbury Project, from 15 to 40 students, under the supervision of practicing attorneys who are members of the law school clinical faculty, provide legal assistance to many of Danbury's 800 inmates. Since its founding in 1970, LSO's Danbury Project has counselled nearly 1600 federal prisoners, making it one of the most extensive and experienced programs of legal assistance to federal prisoners in the country. Hundreds of these cases have involved the federal and state parole systems.

In connection with parole matters, students and supervising attorneys have represented inmates before examiner panels of the United States Board of Parole, assisted in the drafting of administrative appeals from adverse decisions, sought out and presented to the Board information to improve the accuracy of parole files, and appeared before the Board sitting *en banc* in "original jurisdiction" cases. Occasionally, students and supervising attorneys have initiated litigation to establish and enforce the statutory and constitutional rights of their clients in the parole process.[1] LSO has also appeared *amicus*

[1] *See, e.g., Williams* v. *U.S. Board of Parole*, 383 F. Supp. 402 (D. Conn. 1974); *Grasso* v. *Norton*, 376 F. Supp. 116 (D. Conn. 1974), *aff'd in part, modified in part*, No. 74-1222 (2d Cir., June 23, 1975); *Battle* v. *Norton*, 365 F. Supp. 925 (D. Conn. 1973).

curiae in the United States Court of Appeals for the Second Circuit in a case turning upon practices of the United States Board of Parole.[2]

In conjunction with the Daniel and Florence Guggenheim Foundation, LSO has also sponsored two major academic projects concerning the parole system. First, during 1974-75 Yale Law School offered a Parole and Sentencing Workshop. Selected students with relevant clinical experience met monthly with faculty specialists and visiting officials of the Department of Justice, the Office of Probation of the Administrative Office of United States Courts, the United States Board of Parole (including its Chairman and Research Director), the Bureau of Prisons (a staff attorney and a warden), an ex-offender and two federal district judges. The Workshop produced several reports and studies focusing upon the recently revised federal parole procedures and the sentencing and parole provisions of the proposed revision of the Federal Criminal Code.

The other academic project was the first major empirical and theoretical study of the recently reformed federal parole procedures and "guidelines" and the impact of these reforms on judges and the federal sentencing scheme.[3] The importance of these

[2] *United States* v. *Slutsky*, 514 F.2d 1222, 1226-30 (2d Cir. 1975).

[3] Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810 (1975).

reforms to the decision of this case is confirmed by the brief *amicus curiae* of the United States. Along with the casework experience outlined above, these academic programs of LSO inform this brief.

The Federal Plaintiff Class in *Childs* v. *United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974), is comprised of some 90 named federal prisoners representing all federal prisoners eligible for parole consideration under the terms of 18 U.S.C. § 4203.[4] See *id.*, at 1272, 1275; *see also Childs* v. *United States Board of Parole*, 371 F. Supp. 1246 (D.D.C. 1973). The *Childs* litigation commenced in May, 1970, with the filing of a *pro se* complaint challenging the parole release procedures of the United States Board of Parole as contrary to the Due Process Clause of the United States Constitution. The District Court appointed counsel from the undersigned firm of Williams, Connolly & Califano. Over a three-year period, evidentiary hearings were held, and numerous motions and memoranda were filed. In its final Memorandum and Order of October 17, 1973, the District Court made nine separate, detailed findings of fact relating to the absence of and the need for meaningful, written statements of reasons; the *de minimis* administrative burden on the Board in requiring written reasons; the substantial danger of Board decisions being based upon clearly erroneous assumptions of fact under Board practices and procedures; and the resultant need for a federal inmate or his representative to become apprised of the information upon which the Board will pass in rendering a decision. Based upon these findings, the Court concluded and ordered in pertinent part that:

> "1. Defendant must provide narrative written statements of reasons based upon salient facts or factors in each case to all prisoners whose applications for parole are acted upon and not granted. . . .
>
> "2. Defendants are to submit to the court . . . proposed regulations governing access by a prisoner to the information which will be before the Board and the submission of responses on behalf of parole applicants, and
>
> "3. Defendants are to submit to the court . . . proposed procedures for conveying to prisoners reasonably comprehensive explanatory guidance as to the criteria to be considered in passing upon applications for parole." 371 F. Supp., at 1247-48.

The Court of Appeals did not disturb the District Court's ruling on the appropriateness of a class ac-

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[4] 18 U.S.C. § 4203 sets forth the general standard for parole release. It reads in pertinent part:

> "(a) If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole."

tion. On the merits, the Court of Appeals affirmed Paragraph 1 of the above-quoted Order requiring reasons. It vacated and remanded Paragraph 2 for further consideration in light of developments subsequent to the entry of the District Court's order, including the Board's new procedures and guideline system.[5] Despite the potential impact of the *Childs* decision upon the Board of Parole, the Solicitor General did not petition for a writ of *certiorari*.[6] Further proceedings are being conducted in the District Court on remand. The District Court's original decision in *Childs* was relied upon by the Court of Appeals in the instant case in holding "that the due process clause has application to parole eligibility proceedings." (Pet. App. 15).

The Court's decision in this case will affect not only prospective parolees in North Carolina, but also federal prisoners, as recognized by the Solicitor General in his decision to file a brief *amicus curiae* in this case.[7] The purpose of this *amicus curiae* brief

[5] The Board did not appeal Paragraph 3 of the Order because shortly after the District Court's decision, the Board promulgated and began implementing new guidelines on a regional basis. *See Childs* v. *United States Board of Parole, supra,* 511 F.2d, at 1272.

[6] By Order of the Chief Justice on March 12, 1975, the Solicitor General was granted an extension of time to file his petition, but the petition was never filed.

[7] Because of the potential impact of its position on the Court of Appeals' *Childs* holding (that due process guarantees are applicable to the parole application process), the Department of Justice informed counsel for the *Childs* plaintiffs of the Department's contemplated filing of its *amicus* brief herein. *See also* Brief for the United States as *Amicus Curiae,* at 24-25, n. 8, discussing and differing with the *Childs* Court of Appeals' decision.

is to present the facts and legal principles necessary to this Court's understanding of parole due process in the federal context, based in part on experience of the *amici* in representing federal prisoners in the parole system.

Both parties have consented to the filing of this brief.

ARGUMENT

I

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED AND THE CASE REMANDED FOR DEVELOPMENT OF A RECORD ON THE NORTH CAROLINA PAROLE SYSTEM.

Petitioners have chosen to bring this case to this Court on a record consisting only of a *pro se* complaint and a motion to dismiss. The allegations in the complaint must therefore be treated as true for purposes of deciding whether the complaint states a claim. *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 515-16 (1972); *cf. Morrissey* v. *Brewer,* 408 U.S. 471, 476-77 (1972). These limitations notwithstanding, North Carolina and the United States impermissibly contradict the complaint throughout their briefs. They claim, for example, that inmates are supplied written reasons

for denial of parole. Respondents' claim asserts that no reasons were provided for denial. Appendix, at 5. Furthermore, the Solicitor General and the State have asserted that North Carolina has a set of orderly practices governing parole consideration. Neither the record nor any published material outside the record, however, furnishes any support for these bald assertions. "We must therefore treat this case in the posture and on the record [petitioners] elected to rely on in the District Court and the Court of Appeals." *Morrissey* v. *Brewer*, *supra*, 408 U.S., at 477.

An affirmance of the Fourth Circuit's remand for an evidentiary hearing is appropriate in view of the delicate and particular character of the institutions involved. As this Court so carefully noted in *Wolff* v. *McDonnell*, 418 U.S. 539, 568-69, 571-72 (1974), the requirements and practices of penal institutions vary widely. What due process may be required in one institution—or in one parole system—may not be required in another. This Court cannot finally determine what specific types of protections would be required in North Carolina without knowing sufficient facts to be able to assess the interests of the individual prisoners and those of the parole board and the public. Moreover, in addressing the preliminary question of whether due process protects inmates in the parole release decision itself, the Court should have access to detailed information indicating whether, as alleged in the complaint, inaccurate information was relied upon, whether impermissible bias accounted for parole decisions, whether the Commissioners implement systematic policies in making their release decisions, the importance of parole release as compared with other forms of release from prison in North Carolina, and a variety of other basic facts which can now only be asserted without evidence.[8]

The absence of any factual findings in the record on these vital questions precludes reaching the issue of the nature and extent of procedural practices required at parole release hearings. *Cf. Williams* v. *Zuckert*, 371 U.S. 531, 532 (1963); *Needleman* v. *United States*, 362 U.S. 600 (1960); *McCarthy* v. *Bruner*, 323 U.S. 673 (1944). Because "the record is not sufficiently clear and specific to permit decision of [these] important constitutional questions," *Massachusetts* v. *Painten*, 389 U.S. 560, 561 (1968), the Court should focus exclusively on the only issue decided by the Court of Appeals: whether inmates eligible for parole have a sufficient liberty interest to trigger the protections of the Due Process Clause.[9]

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[8] Extensive evidence as to these and other considerations was before the District Court in *Childs* v. *United States Board of Parole*, *supra*. Likewise, the District Court in *Wolff* v. *McDonnell*, *supra*, held an evidentiary hearing where witnesses, including the warden, testified. 418 U.S., at 543, 563-64.

[9] Petitioners raised only two issues as "Questions Presented" in their petition for a writ of *certiorari*. In addition to a procedural and jurisdictional question involving the applicability of *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), the sole other

Constitutional adjudication affecting the lives of thousands of prison inmates should not be grounded on speculation and conjecture or based upon the rhetorical flourishes of appellate advocates. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 420 (1974) (considerations urged by New Jersey's counsel in parole case proved irrelevant in practice to State parole board). Nor should such delicate questions be explored in a non-factual vacuum. The remainder of this brief shows that generally available secondary source information supports the Court of Appeals' conclusions that the Due Process Clause guarantees procedural fairness in parole release decisionmaking. Only a re-

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question was "WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS APPLICABLE TO THE PROCEDURES FOLLOWED BY A PAROLE COMMISSION IN CONSIDERING AN INMATE FOR PAROLE." Petition, at 2. Petitioners never raised the separate question of, assuming the Due Process Clause is generally applicable to parole release decisionmaking, the nature and extent of those procedures required by the Fourteenth Amendment. Rule 23(1)(c) of the Supreme Court Rules provides that "only the questions set forth in the petition or fairly comprised therein will be considered by the Court." While Rule 15(1)(c) indicates that "the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein . . .", it is essential that any supposed subsidiary question arise in the record. *Tyrrell* v. *District of Columbia*, 243 U.S. 1 (1917). Moreover, this question was not reached by the Court of Appeals. *See generally* R. Stern & E. Gressman, *Supreme Court Practice* § 6.37, at 297-98 (4th ed. 1969). It is inappropriate for petitioners to add to the substance of the Question Presented in their petition for a writ of *certiorari*. *See id.*, § 13.8, at 466-68.

mand for full hearing, however, "can assure development of the actual facts, not just the pleaded contentions of the parties." *Ridley* v. *McCall*, 496 F.2d 213, 214 (5th Cir. 1974).

II

THE DUE PROCESS CLAUSE APPLIES TO THE PAROLE RELEASE DECISION.

Prisoners have an interest in their eventual release on parole that comes within the constitutional protection of "liberty." Release on parole is no "mere anticipation or hope of freedom", *Morrissey* v. *Brewer*, *supra*, 408 U.S., at 482 n.8, quoting *United States ex rel. Bey* v. *Connecticut Board of Parole*, 443 F.2d 1079, 1086 (2d Cir.), *vacated as moot*, 404 U.S. 879 (1971).[10] Rather, it is a fundamental and integral part of the correctional system, of enormous value to both the inmate and the state. The discretionary nature of the decision to release, like the discretionary decision whether to revoke, affects liberty in a sufficiently important way to invoke appropriate procedural protections. Indeed, the interest at stake in the parole release hearing is not constitutionally distinguishable from the valuable liberty this Court sought to protect in *Morrissey*. As Judge

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[10] *Bey* relied exclusively on *Menechino* v. *Oswald*, 430 F.2d 403 (2d Cir. 1970), for this characterization, a dictum now expressly rejected in *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925, 927-28 & n.2 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974).

Fahy observed in *Childs* v. *United States Board of Parole, supra*, 511 F.2d, at 1278:

> "The deprivations due to revocation of the conditional liberty enjoyed by a parolee demonstrate the serious effects of denial of parole. The applicant is deprived of the valuable features of conditional liberty described by the Court. This seems to us to place the procedures by which this deprivation is accomplished by the government under a standard of due process. The Board holds the key to the lock of the prison. It possesses the power to grant or to deny conditional liberty. In the exercise of its broad discretion it makes judgments concerning the readiness of an inmate to conduct himself in a manner compatible with the well-being of the community and himself. If the Board's decision is negative, the prisoner is deprived of conditional liberty. The result of the Board's exercise of its discretion is that an applicant either suffers a 'grievous loss' or gains a conditional liberty. His interest accordingly is substantial. We think it follows that the parole decision must be guided by minimal standards of due process of law which at the same time reflect the need of the parole system to function consistently with its purposes and responsibilities."

A. Far More Than A Unilateral Hope Of Prisoners, Parole Is A Fundamental, Necessary Component Of The Correctional System.

This Court and others have recognized that the parole release decision is one of the most significant

parts of an entire process or system which our political and social institutions have evolved dealing with convicted persons. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). For a variety of reasons, parole has come to be essential to the administration of post-conviction justice. The widespread, systematic reliance on parole release which has followed this development means that for most prisoners, in most states, the parole release decision is at least as important as the sentencing decision in determining how long they will be incarcerated. As the Attica Report attests, "[i]n practice, the Parole Board—not the judge—decides how long an inmate will serve time." *The Official Report of The New York State Special Commission on Attica* 93 (Bantam Books ed. 1972). *See also* S. Rep. No. 94-369, 94th Cong., 1st Sess. 15-16 (1975) ("Parole is an extension of the sentencing process. . . . The final determination of how much time an offender must serve is made by the parole authority.") The interest prisoners bring to the parole decision, therefore, is no "unilateral expectation" or "hope." In the parole decision, as in sentencing, while the person duly convicted of a criminal offense no longer has an unqualified right to liberty, he nonetheless retains a constitutional interest in freedom that requires minimal standards of fair treatment. *See, e.g., United States* v. *Tucker*, 404 U.S. 443 (1972); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *Townsend* v. *Burke*, 334 U.S.

736 (1948).[11] As the Court of Appeals noted in *Childs* v. *United States Board of Parole*, *supra*, 511 F.2d, at 1280:

> "Just as the Court found in *Wolff* [v. *McDonnell*, *supra*, 418 U.S., at 557] that the State, having created the valuable right to good time, must act according to constitutional safeguards when it withdraws the right, so here, where the federal government has made parole an integral part of the penological system, . . . it is also essential that authority to deny parole not be arbitrarily exercised."

Pre-expiration release has, in effect, been institutionalized in this country. Parole cannot be characterized as simply an alternative to pardon, reserved for those few prisoners who may be said to be rehabilitated in prison.[12] Rather, in most states

[11] As the Second Circuit found in *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925, 928, (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974) (emphasis added):

> "[T]he average prisoner, having a better than 50% chance of being granted parole before the expiration of his maximum sentence, has a *substantial 'interest'* in the outcome. For him, with such a large stake, the Board's determination represents one of the most critical decisions that can affect his life and liberty."

[12] As the South Carolina Department of Corrections has forthrightly acknowledged:

> "Where parole is the common, almost universal, method of release from prison it comes to be viewed more often as a right—indeed it is the norm—than where it is granted reluctantly and rarely, and in jurisdictions with long statutory sentences, infrequent use of pardon, and no other alternative to sentence mitigation, parole becomes crucially important to inmates . . . ." South Carolina Department of Corrections, *The Emerging Rights of the Confined* 198 (1972).

and in the federal system, parole and the good-time laws work hand in hand to keep prison populations down to acceptable levels, to mitigate the harshness of sentences, to minimize unwarranted disparities between persons receiving prison sentences and those placed on probation, and finally, to control prison behavior by offering incentives to discipline and participation in rehabilitative and vocational programs.[13] A system which depended merely on the unfulfilled, unilateral expectations of its subjects could not succeed in these functions. Rather, parole is regarded by inmates, prison administrators and parole officials as a pervasive fact of prison life, a carrot to be waved by rehabilitative staff, a stick to be wielded by guards and other correctional personnel to ensure good behavior.[14] In this light, it more properly must be regarded as a system of mutual expectations which

[13] *See* Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 Am. U.L. Rev. 477 (1973); Comment, *The Parole System*, 120 U. Pa. L. Rev. 282 (1971).

[14] *See* Hearings Before Subcomm. No. 3 of House Comm. on Judiciary, 92d Cong., 2d Sess., Ser. 15, pt. 7-A, at 483, 493-94 (1972). In the federal system, an inmate who has forfeited satisfactory good time for disciplinary infractions cannot be granted parole. 28 C.F.R. § 2.29 (1975), *as amended*, 40 Fed. Reg. 41328-42 (Sept. 5, 1975).

in some jurisdictions have been formally set down in statutes, rules or regulations, and in others, remains informal. In either system, however, definite and mutual expectations arise that most inmates will be released on parole at some time prior to the expiration of their maximum terms.

Parole is the usual form of release from incarceration, particularly for inmates with sentences over two years.[15] Furthermore, sentencing judges assume in setting maximum terms that inmates will be released earlier, and many have been known to tell the defendant that "you have the key to prison in your pocket."[16] The recent Survey of Sentencing Judges conducted by the Yale Law Journal is particularly illuminating on this point, since at the time the survey was conducted, the revised federal parole decisionmaking system had not yet been fully effectuated and was not generally known or understood by the judges responding to the Survey. Their

[15] In North Carolina, secondary data indicate that 62.4% of each year's releases are on parole. M. Hindelang, et al., *Sourcebook of Criminal Justice Statistics 1973* (U.S.L.E.A.A.), at 359. This figure is near the national average rate. *See* U.S. President's Comm'n on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 70 (1967). Indeed, in 1967 some 30 percent of the total state and federal prison population were released on parole. U.S. Bureau of the Census, *Statistical Abstract of the United States* 157 (1970).

[16] *See* Newman, *Foreword* to Project, 84 Yale L.J. 810, 812-13 (1975); *id.*, at 882 n.361, 890 nn.386-88; *see also Childs* v. *United States Board of Parole, supra,* 511 F.2d, at 1278; *cf. United States* v. *Slutsky,* 514 F.2d 1222, 1229 (2d Cir. 1975).

responses are thus even more indicative of the attitudes of the judiciary in jurisdictions still operating under a more traditional parole system such as North Carolina appears to operate. Two-thirds of these experienced federal judges reported that they expected the defendants they sentenced to be released before serving the full term imposed. And nearly half expected release to come immediately upon eligibility. Project, *supra,* note 3, 84 Yale L.J., at 882-83 n.361. The prisoner's interest in parole is hardly a unilateral expectation.

B. A Parole Board's Broad Grant Of Discretionary Authority Hardly Precludes The Application Of Due Process.

The haphazard state of parole decisionmaking has prompted many of the reform efforts—judicial, legislative and administrative—discussed in the brief of the United States. The failure to provide reasons or to afford a reasonable opportunity for the inmate to contribute information and to respond to adverse evidence is at odds with fundamental notions of the way governmental agencies should operate to their own best advantage and to comply with minimal requirements of fairness. *See Wolff* v. *McDonnell, supra,* 418 U.S., at 555-58; K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* 126-133 (1969). In *Morrissey,* this Court emphatically rejected the notion that a parole board's discretionary authority is inhibited, much less thwarted, by minimum standards of procedural fairness.

> "Nor are we persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion. Serious studies have suggested that fair treatment on parole revocation will not result in fewer grants of parole." 408 U.S., at 483 (footnote omitted).

In countless other areas of public life, administrative agencies empowered to make discretionary judgments are required by law to follow procedures designed to assure that, whatever the decision may be, it has been arrived at fairly and as accurately as possible. Such rules are no less incompatible with parole release decisionmaking than they are with those made by federal agencies which go beyond minimal requirements and seek to attain the maximum in fairness and correctness of decisionmaking.

This was clearly the judgment of the House Judiciary Committee in reporting favorably, and the full House of Representatives in passing by a vote of 260 to 137, the Parole Reorganization Act of 1975 (H.R. 5727), which

> "provides an infusion of due process into Federal parole procedures. The parole system has long been recognized as the single most unequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map. Sixth Amendment criminal prosecution protections that have been gained through the courts have

> been hard fought and remain inadequate." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 2 (1975).[17]

The fact that a particular parole decision is not *dictated* by any given set of facts does not, as the *amicus* brief of the United States would have it, extinguish the prisoner's right and need to have evaluations made fairly and, to the extent facts are relevant, accurately.

C. The Prospective Parolee's Interest In Liberty Is Constitutionally Indistinguishable From That Of A Parolee Facing Revocation.

The basic thrust of the Solicitor General's argument—that persons inside prisons do not share the same interest in parole release with those already on parole—must be seen as fundamentally mistaken. Certainly, the interest is not precisely the same.

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[17] On September 11, 1975, the Senate Judiciary Committee reported favorably an amended version of H.R. 5727, entitled the Parole Commission Act. In its Report accompanying the bill, the Senate Judiciary Committee noted:

> "Parole is perhaps the most important item in the mind of every prisoner because it is his key to the door. It is essential, then, that parole has both the fact and appearance of fairness to all. Nothing less is necessary for the maintenance of the integrity of our criminal justice institutions. The openness and sense of fairness that is intended in the provisions of this legislation will have the beneficial effect of allowing the participants in parole —the inmates—to understand their place in the system and to better appreciate what is expected of them." S. Rep. No. 94-369, 94th Cong., 1st Sess. 19 (1975).

A factual difference exists between the present enjoyment of conditional freedom and a present interest in the likelihood of conditional freedom. The nature of the interest, however, is identical. As the Second Circuit has recognized, "the stakes are the same: conditional freedom versus incarceration." *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra*, 500 F.2d, at 928. While the degree of hardship imposed by the denial of parole and the revocation of parole may differ, and may justify differences in the degree of procedural protection accorded, the Court has already decided in *Morrissey* that a person's interest in conditional freedom is at the heart of the liberty protected by the due process guarantee.

> "By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal." 408 U.S., at 482.

Indeed, this case follows *a fortiori* from *Wolff* v. *McDonnell, supra*. If the prisoner's interest in the threatened delay of a tentative future release date is protected, so must be the prospect of definite conditional freedom. Given the high level of mutual expectation and the significance of "making parole" to a prisoner's degree of freedom, the Due Process Clause certainly should apply.

III

DETERMINATION OF THE APPROPRIATE MINIMUM PROTECTIONS REQUIRES AN ASSESSMENT OF THE INTERESTS AT STAKE IN THE PAROLE RELEASE DECISION.

The determination of what process is due in the parole release decision must be based on careful consideration of the interests of the state, the prisoner and the general public. The interest of these various groups can be assessed and weighed by meticulously examining and scrutinizing the parole process in general, with particular focus on the release aspect. The strengths and shortcomings of recent changes in the federal parole process may help point to the appropriate balance.

A. The Interests At Stake.

The state, of course, has an interest in the efficient administration of the parole system. The state also has an interest in insuring the integrity and appearance of integrity of the parole process. This interest is dictated by the unique and well-established role of parole release in the criminal justice system and rehabilitative process. It requires that parole release decisions must not be arbitrary and that they be based on all available accurate data. *See, e.g., United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra*, 500 F.2d, at 932-33. " 'One can imagine nothing more cruel, inhuman and frustrating than serving a prison term without

knowledge of what will be measured and the rules determining whether one is ready for release.'" K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* 132 (1969), quoting Porter, *Criteria for Parole Selection*, in Proceedings of American Correctional Association, at 227 (1958).

This concern is shared by society in general since it, too, has an obvious and real interest in the integrity and success of the rehabilitative process. To fulfill its promise to society, parole must not frustrate or embitter prisoners by subjecting them to what are, or appear to be, arbitrary or irrational decisions based on caprice or inaccurate information.[18] Nearly all prison inmates face a parole release decision at some point during their term of incarceration. Moreover, as we have previously shown, parole is the most common form of release. The importance of parole's impact on the rehabilitative process, recognized by this Court in the revocation context in *Morrissey*,[19] is heightened in the parole release de-

[18] The Attica Commission found that "[f]ar from instilling confidence in the Parole Board's sense of justice, the existing procedure merely confirms to inmates, including those receiving favorable decisions, that the system is indeed capricious and demeaning." *Official Report of The New York State Special Commission on Attica* 98 (Bantam Books ed. 1972); *see also, id.*, at 97. Two of the "Fifteen Practical Proposals" put forward by the Attica inmates related directly to parole. *See* T. Wicker, *A Time To Die* 317 (1975).

[19] "The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. See *People ex rel. Menechino* v. *Warden*, 27 N.Y. 2d 376, 379, and n. 2, 267 N.E. 2d 238, 239, and n. 2 (1971) (parole board had less than full picture of facts). And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." 408 U.S., at 484.

cision setting. The greater number and greater public awareness of parole release decisions, as compared with revocations, makes their fairness all the more crucial.

These considerations flowing from the state's and society's interests in ensuring the integrity of the parole process are consistent with the prisoner's interest in "liberty" through conditional freedom from incarceration. He, too, has an interest in the release decision being made on the basis of accurate data. He, too, has an interest in having all such available data before the decisionmaker. And perhaps most importantly, he, too, has an interest in being free from arbitrary decisions or decisions cloaked in secrecy and influenced by irrational, inconsistent or impermissible criteria. *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra*, 500 F.2d, at 929. In the absence of any indication of how decisions are made or what they are based on, prisoners are left to counterproductive speculation and are deprived of an important incen-

tive and guide to future conduct. *See Morrissey* v. *Brewer, supra,* 408 U.S., at 484; *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra,* 500 F.2d, at 932-33.

B. Strengths and Weaknesses Of Recent Changes in the Federal Parole System.

The interests at stake in the parole release decision, as this Court has recognized, are exceedingly difficult to balance appropriately. The experience of the United States Board of Parole in recent years illuminates some of the concrete factors that must be considered in this attempt.

The United States Board of Parole, under escalating criticism from scholarly, professional and lay critics and under increasingly stringent scrutiny by the federal courts, undertook in the early 1970's its own review of its policies and decisionmaking processes. The system which evolved through this effort apparently represents the Board's attempt to systematize those factors and policies which were actually in effect in their earlier years of seemingly policy-less decisionmaking. Therefore, although the Board's "guideline" system for decisionmaking may appear to be radically different from the more informal systems prevalent in most state systems, in effect the guidelines have merely articulated and made more easy to implement the basic concerns of deterrence, punishment, rehabilitation and incapacitation which have always been at the root of parole

release decisionmaking. *See generally* Project, *supra* note 3, 84 Yale L.J., at 820-33.

Under the guideline system, an inmate's parole release date will generally be determined by two ratings. *See* 28 C.F.R. §§ 2.1-2.58 (1975), *as amended,* 40 Fed. Reg. 41328-42 (Sept. 5, 1975). The first rating ("salient factor score"), based primarly on past criminal record and personal history, reflects the likelihood that the inmate will be a recidivist, *i.e.,* that he will fail to abide by the law upon release. The second rating ("offense severity") reflects the Parole Board's view of the relative severity of the offense committed. An inmate's expected release time is based on the average amount of time served before release by past groups of inmates having similar salient factor scores and offense severity ratings.

In addition to the objective guidelines for decisionmaking, the Board adopted a series of procedural changes [20], many of which have been urged here by

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[20] After initial opposition to congressional intervention, the Parole Board established a working relationship with the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice in the summer of 1972 and adopted administratively many of the Subcommittee's recommendations for procedural reform. *See* H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 2 (1975). Still other significant changes were made by the Board only as a result of persistent litigation. *See, e.g., Childs* v. *United States Board of Parole, supra.* In fact, the latest amendments to the Board's regulations in 40 Fed. Reg. 41328-42 (Sept. 5, 1975)—calling for improved fact-finding procedures, increased disclosure to parole appli-

the respondents. Inmates are now given hearings, which they may attend with a "representative", who may give a supporting statement but only at the conclusion of the hearing. 28 C.F.R. §§ 2.12, 2.13, *as amended.* The inmate is also permitted to make a statement, and both inmate and representative may respond to questions. *Ibid.* The inmate is immediately informed orally of the decision made by a panel of two hearing examiners and is normally to be notified in writing of the decision and underlying reasons within 15 working days of the hearing. *Id.*, § 2.13(d).

The guidelines have improved the task of parole release decisionmaking by "structuring" the discretion accorded the Parole Board. In any case in which the hearing examiners believe that the time indicated by the guidelines is too short, or too long, they may recommend a decision "outside" of the guidelines. 28 C.F.R. § 2.20(c),(d), *as amended.* The examiner's recommendation is supported by a reason and is reviewed by the Regional Director, who is a member of the Board of Parole. Approximately 80% of first parole decisions are within the

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cants of their files and records, and in-person hearings for inmates sentenced under 18 U.S.C. § 4208(a)(2) upon completion of one-third of their sentence—were likely required or influenced by recent litigation. *See, e.g., Garafola* v. *Benson,* 505 F.2d 1212 (7th Cir. 1974); *Childs* v. *United States Board of Parole, supra.*

guidelines, with some 20% falling outside the guidelines.[21]

The Board's experience to date under these procedures substantially undercuts the United States' suggestion that a decision by this Court affirming the Court of Appeals would adversely "affect the constitutional context in which the federal parole system operates." Brief for the United States as *Amicus Curiae,* at 2. *See* Sigler, "Abolish Parole?", 39 Fed. Probation, June 1975, at 42; Project, *supra,* note 3. The same argument advanced by the United States could be made against the substantive and procedural reforms that would be required by the Parole Reorganization Act of 1975 and Parole Commission Act (H.R. 5727). See pages 18-19, *supra.* It can hardly be doubted, however, that Congress possesses the power to enact legislation guaranteeing "an infusion of due process into Federal parole procedures." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 2 (1975).[22] *Cf. Katzenbach* v. *Morgan,* 384 U.S. 641 (1966).

Even though the Parole Board has taken some steps along the road to a fairer and more effective

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[21] Project, *supra* note 3, 84 Yale L.J. at 869 n. 293 (1975).

[22] In passing its amended version of H.R. 5727, the Senate Judiciary Committee recognized that:

> "The denial of parole is in a limited sense the taking of an individual's liberty, or at least the opportunity for him to obtain liberty. *The Constitution requires due process of law . . . .*" S. Rep. No. 94-369, 94th Cong., 1st Sess. 19 (1975) (emphasis added).

parole system, the Yale Law Journal study revealed substantial need for improvements. Commonly, the hearings were not used to verify information considered by the panel to be significant.[23] On those oc-

[23] Some of the most recent changes instituted by the Board should help decrease this problem, but substantial improvements must still be made in the accuracy of information relied upon by the Parole Board. As researchers for the United States Board of Parole have complained:

> "Unfortunately, the files are not uniformly complete and frequently include obviously conflicting information [such as vocational or educational programming and drug use].
>
> "In one file, an inmate was listed as an illiterate who spoke only Spanish at admission. A later report listed the inmate as having completed 40 hours of college credit . . . .
>
> "Instances of misfiling are frequent. Often a report will indicate that the same subject is a white male, while the picture in that same file shows what appears clearly to be a black (or vice versa). Presentence reports are often found inaccurately filed . . . .
>
> "Numerous examples of discrepancies in the files could be cited [such as birth dates and date of first arrest]. . . .
>
> "The inmate's arrest record is an important source [of information]. In many cases no specific information is given about the number of prior arrests, convictions, dates, fines, or time actually served. The Federal Bureau of Investigation arrest records which appear in many of the files are very difficult to use, since the same arrest and conviction may be entered six or seven times at each stage of arrest, transfer, conviction, and incarceration; and dispositions often are not shown.
>
> ". . . [This] lack of uniformity, clarity, and concern for the accuracy of information [in prison files] sets obvious limits upon the quality of information which may be reliably extracted from the files . . . ." S. Singer & D. Gottfredson, *Development of a Data Base for Parole Decision-Making* 2-5 (NCCD Research Center, Supp. Report No. 1, 1973).

casions when discussion did ensue, material errors were often revealed. An error in the files may, on the one hand, lead to a longer period of incarceration at government expense than is warranted, or on the other hand, may result in the premature release of an inmate whom the Board would wish incarcerated for a longer period in order to protect the public. An adequate opportunity to verify significant information is therefore crucial to the interests of both inmate and society.

> "There is no reason why an inmate should have to wait for an error to be corrected through the administrative process, or eventually by the courts, when the likelihood of error is fostered by the absence of safeguards and lack of fairness in the original determination." Project, *supra* note 3, 84 Yale L.J., at 862.

In short, while only a full evidentiary hearing can develop the facts necessary to identify and balance the interests at stake in the North Carolina parole system, the recent experiments and developments in the federal parole system show that significant improvements are not only possible, but practical as well. Constitutionally based minimum standards can only foster such improvements.

CONCLUSION

Evidence available from observation, participation and secondary sources demonstrates that the Due Process Clause applies to parole release hearings and that minimum procedural protections designed to ensure accuracy, fairness and the appearance of integrity are essential. The extent of procedural protections necessary for fair and just parole release decisionmaking turns on factual issues not yet adjudicated. The Court of Appeals' decision to remand this case for hearing should thus be affirmed.

Respectfully submitted,

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DATED: September 22, 1975

Supreme Court, U. S.
FILED
JUL 16 1975
MICHAEL RODAK, JR., CLERK

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BRIEF OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

As amicus the State of California addresses the second of the three issues raised in the petition for writ of certiorari, namely, the application of the decision in *Preiser v. Rodriguez,* 411 U.S. 475 (1973).

The State's interest is generated by reason of its concern in the management of a prison population of approximately 20,000 felons. In 1974 over 4,000 male felons were paroled. In addition, during the same

year, approximately 20,000 male felons were interviewed for release date consideration and, of these, approximately 5,000 were granted release dates. The prospective administrative parole consideration caseload for the calendar year 1975 (estimated from 1974 figures) would exceed 7,000.

The State of California is entitled to ". . . the first opportunity to correct the errors made in the internal administration of [its prison and parole system]." *Preiser v. Rodriguez,* at 492. Improper denial of parole consideration may be corrected by state habeas corpus. If the prisoner is not afforded this relief he may then file an application for habeas corpus in federal court. Proceedings under Title 42, U.S.C. §1983 would improperly bypass this orderly process.

SUMMARY OF ARGUMENT

Parole consideration concerns the alternatives of release from prison or continued confinement. A federal court has jurisdiction to consider the legality of continued confinement only in the context of federal habeas corpus proceedings. Any challenge to continued confinement, based on an assertion that parole was withheld, may only be brought by a habeas corpus application. That the challenge is framed as a demand for due process in parole consideration procedures does not alter the fact that the challenger's only interest is release from prison.

ARGUMENT

In *Preiser v. Rodriguez, supra,* 411 U.S. 475, 489-90, 500 (1973), this Court found that it would frustrate explicit congressional intent to permit state prisoners to challenge the fact or length of their confinement under Title 42, U.S.C. § 1983. *Rodriguez* holds that the sole federal remedy is habeas corpus where the challenge arises from state administrative action affecting duration of confinement. The United States Court of Appeals for the Fourth Circuit, however, has concluded that *Rodriguez* was inapplicable as "[t]he sole thrust of their [the prisoners] complaints is a constitutional attack on the procedures of the respective parole boards [and] . . . not the right to parole but the right to procedural due process in the consideration of parole."

It is undisputed that the interest of a prisoner in parole consideration is an interest in release from confinement. Continued confinement, after assertedly invalid parole consideration procedures, is the cause at issue. Without such complaint no case or controversy would exist.

A challenge to confinement is a habeas corpus matter. The available relief is a writ requiring either correction of the illegality or release from custody. See, *Whiteley v. Warden,* 401 U.S. 560, 569 (1971); *Reck v. Pate,* 367 U.S. 433, 444 (1961). The nature of the requested relief and the prisoner's interest cannot be changed simply by an assertion that only the procedures are being challenged and not the confinement itself. "It would wholly frustrate explicit con-

gressional intent to hold that the respondents in the present case could evade this requirement [of exhaustion of state remedies] by the simple expedient of putting a different label on their [requested relief]." *Preiser v. Rodriguez,* at 489-490.

In *Rodriguez,* at 489, counsel for respondents acknowledged that a state prisoner's challenge to his underlying conviction and sentence was limited to habeas corpus. Such an acknowledgment could not have been avoided by the assertion that the challenge was to a denial of procedural due process at trial and not to the conviction itself. Nevertheless, the Court of Appeals in the instant case attempts to hold that a prisoner may attack the parole processes without also challenging the confinement without parole.

A challenge by a state prisoner to parole consideration procedures falls within the holding of *Rodriguez.* Whether, and if so, what process is due at a particular parole proceeding depends on the prisoner's interests which are at stake at that proceeding, e.g., *Morrissey v. Brewer,* 408 U.S. 471, 481-482 (1972). The inmate interest at stake at a parole consideration proceeding is in being released on parole. It is only this interest which could afford a basis for determining what process, if any, is due at such proceedings. A claim that due process is denied by parole consideration procedures which does not carry with it a further claim that the result of those procedures is invalid under the Constitution, fails to present the only interest which would constitute a basis for a claim and to which due process might attach.

CONCLUSION

Amicus submits that when a state prisoner challenges parole consideration proceedings on procedural due process grounds, he is limited to habeas corpus as the sole federal remedy. Title 42, U.S.C. § 1983 is unavailable.

Dated, San Francisco, California,
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Supreme Court, U. S.
FILED
JUL 16 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 74-1287

ROBERT WEINSTEIN, ET AL.,
Petitioners

v.

HAROLD E. BRADFORD,
Respondent.

BRIEF FOR THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States the Commonwealth of Virginia as Amicus Curiae submits this Brief in support of Petitioners. The interest of the Commonwealth of Virginia in this matter rests upon its acute concern with the continued existence and growth of the parole system as an integral part and increasingly more important part of the correctional system. Heavy emphasis is now being placed upon alternatives to incarceration as a result of a shift in emphasis from punishment to rehabilitation. The Commonwealth, while believing that parole procedures must be essentially fair, is

concerned with the assertion that the due process of law clause of the Fourteenth Amendment of the Constitution of the United States is applicable to such procedures, believing that the clause does not apply to such procedures and that application of the clause to such procedures can only result in a tendency toward destruction of the parole system, its nature, and goals. Application of the clause and of any of its specific requirements would tend to adversely affect parole systems in each of the States, as well as the Federal parole system. This Brief is intended to be reflective of the concern of the Commonwealth in that respect.

ISSUE PRESENTED

I.

Is The Due Process Clause Of The Fourteenth Amendment Of The United States Constitution Applicable To Parole Procedures?

RELEVANT CONSTITUTIONAL PROVISIONS

Fourteenth Amendment To The Constitution Of The United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARGUMENT

I.

The Due Process Requirements Of The Fourteenth Amendment Of The United States Constitution Are Not Applicable To Parole Procedures.

Prior to the decision in this case by the United States Court of Appeals for the Fourth Circuit, it had been held in several Circuits that the due process clause of the Fourteenth Amendment was not applicable to parole procedures. *Menechino* v. *Oswald*, 430 F.2d 403 (2nd Cir. 1970), cert. den., 400 U.S. 1023 (1971); *Walker* v. *Oswald*, 449 F.2d 481 (2nd Cir. 1971); *Scarpa* v. *United States Board of Parole*, 477 F.2d 278 (5th Cir. 1973), vacated on other grounds, 414 U.S. 809 (1973); *Buchanan* v. *Clark*, 446 F.2d 1379 (5th Cir. 1971); *Baines* v. *U.S.*, 445 F.2d 260 (8th Cir. 1971); *Schawartzburg* v. *Board of Parole*, 399 F.2d 297 (10th Cir. 1968). *Hyser* v. *Reed*, 318 F.2d 225 (D.C. Cir. 1963), cert. den. sub. nom. *Thompson* v. *United States Board of Parole*, 375 U.S. 957 (1963).

Morrissey v. *Brewer*, 408 U.S. 471 (1972), *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), and *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), in which it was held that the due process clause was applicable to procedures involving revocation of parole, revocation of probation, and prison disciplinary proceedings, respectively, do not lend support to the view that the due process clause is applicable to parole procedures.

These decisions all related to a State's power to adversely change the existing status of an individual and were concerned with the forfeiture of a present status and the deprivation of an existing liberty.

An inmate has no constitutional right to parole. Parole arises only pursuant to enabling legislation. The due process

clause of the Fourteenth Amendment does not require a hearing in every conceivable case of governmental impairment of a private interest. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961).

The issue in this case, not over-simplified in the view of Amicus Curiae, is whether there is a Constitutional requirement that parole procedures now be transformed into adversary proceedings. For if there is application of due process of law requirements to parole procedures, that will be the result.

The nature of parole proceedings as they presently exist, is well summed up by Judge (now Chief Justice) Burger in *Hyser, supra*, in 318 F.2d at p. 237:

> "The Bureau of Prisons and the Parole Board operate on the basic premise that prisoners placed in their custody are to be rehabilitated and returned to useful lives as soon as in the Board's judgment that transition can be safely made. This is plainly what Congress intends. Thus, there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of parens patriae. . . .
>
> * * *
>
> "Fundamentally the Parole Board's interest and its objectives are to release a prisoner as soon as he is a good parole risk and to allow him to remain at liberty under . . . supervision as long as he is a good risk . . ."

Parole procedures are not presently adversary in nature. There are no plaintiffs; there are no defendants. The procedures are not a matter of contest. There is no presumption against an inmate, and an inmate faces no opponent in the procedures. There are no "accusations"; there are no "accused."

Assuming that the due process clause of the Fourteenth Amendment were applicable to parole procedures and that ordinary due process requirements were thus applicable, such as appointment of counsel to represent indigent inmates, compulsory attendance of witnesses on behalf of inmates, compulsory attendance of witnesses adverse to an inmate, disclosure to an inmate prior to hearing of material to be relied on by a parole board, it is submitted that such procedures would tend to bankrupt and disrupt the parole system and its goals. On the other hand, if none of these requirements were applicable even though it was held that the due process clause was applicable, a decision holding the clause to be applicable would be somewhat meaningless. Thus, it is considered appropriate by the Amicus Curiae to consider normal requirements of the Clause in an attempt to determine whether the clause itself is applicable, even though this might appear to constitute a "back-door" approach.

As the Court in *Wolff, supra*, *Morrissey, supra*, *Gagnon, supra*, and *Hannah* v. *Larche*, 363 U.S. 420 (1960), did not refuse to recognize institutional safety or correctional goals in applying due process standards, it is submitted that there can be no refusal to recognize the practical administrative realities of the relief which Appellees seek as well as the nature and goals of parole as reflected in present procedures, before holding the due process clause to be applicable at all.

Requirements of locating competent counsel appointing them to represent inmates, the determination of and subpoenaing of witnesses adverse to the inmate, subpoenaing of

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witnesses on behalf of inmates, providing a mechanism by which inmates could review files in advance of the hearing, providing for the security of such files, actual hearing of in witnesses, cross-examination of witnesses, and arguments of counsel would totally change the present system and make near impossible the reaching of its present goals.

If the due process clause were made applicable to such procedures, and for example, counsel were required to be appointed for inmates, the result might necessarily be that the State would be forced to take a "side" against the inmate and use its legal talent, all evidence that could muster, any reasonable argument it could make, in order to defeat the granting of parole if, for no other reason, than to make each side "equal" in the proceedings. Such a result would be catastrophic to the system and would be opposed to the very nature and theory of parole.

In *Gagnon, supra*, the Court in addressing itself to the right of counsel at probation revocation hearings stated as follows:

> "The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all availabe evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in Morrissey as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge of a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to

> reincarcerate rather than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record and the possibility of judicial review—will not be insubstantial." (footnote omitted.) 411 U.S. at pp. 787-788.

Applicability of the due process clause may not be considered in a vacuum. It must be considered as it relates to the nature and goals of parole and to the practical application of those goals.

In *Morrissey* v. *Brewer, supra*, the Court stated in 408 U.S. at p. 480 as follows:

> "We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a Defendant in such a proceeding does not apply to parole revocations."

In *Wolff, supra*, the Court repeated the statement as applicable to prison disciplinary proceedings.

In *Wolff, supra*, the Court stated in 418 U.S. at p. 561:

> "In striking the balance that the Due Process Clause demands, however, we think the major consideration militating against adopting the full range of procedures suggested by Morrissey for alleged parole violators in the very different stake the State has in the structure and content of the prison disciplinary hearing."

The Court then reviewed realities surrounding the components of a penal system.

In *Wolff, supra*, the Court in 418 U.S. at p. 572, after holding specifically how due process applied to prison disciplinary proceedings, stated as follows:

> "It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmate and the needs of the institution."

In *Goss* v. *Lopez*, 419 U.S. 565 (1975), the Court held that the due process clause of the Fourteenth Amendment required hearings prior to suspension of students from school.

The Court stated in 419 U.S. at p. 579 as follows.

> "It also appears from our cases that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved. *Cafeteria Workers* v. *McElroy*, *supra*, at 895; *Morrissey* v. *Brewer*, *supra*, at 481."

The Court also stated at 419 U.S. at p. 583 as follows:

> ". . . . Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cause more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroys its effectiveness as part of the teaching process."

In *Wiley* v. *United States Board of Parole, et al.*, 380 F.Supp. 1194 (M.D. Pa. 1974), the Court stated as follows:

> ". . . . It is apparent that due process does not require that the full panoply of rights due a parolee in a parole revocation proceeding be imposed on parole decisionmaking. Unlike a parolee facing reimprisonment who stands to lose a presently enjoyed interest in his conditional freedom, the prisoner being considered for parole release has a mere anticipation or hope of freedom. More important is the fact that the nature of parole decision-making is vastly different from that of parole revocation. Unlike a parole release decision, a necessary precondition to a parolee's reincarceration is a finding that he has violated a condition of his parole. The parolee's loss of his conditional freedom turns in large part on a retrospective determination of a specific factual question. In contrast, the parole release decision, as emphasized above, is a prognostic determination with respect to one's suitability for parole and is based on a complex of tangible and intangible factors and involves the discretionary application of knowledge derived from such fields as psychology, criminology, sociology and penology. While the parole revocation procedure basically is concerned with making a factual determination with respect to parole violation, parole decisionmaking centers on making a diagnostic and predictive determination with respect to whether the rehabilitation of the prisoner and the welfare of society generally would be best served by granting the inmate's conditional freedom rather than by his physical confinement." (380 F.Supp. at p. 1200).

It has been rather consistently held that various due process requirements are not applicable to parole procedures. *Menechino, supra; Ott* v. *Ciccone*, 326 F.Supp. 609 (W.D. Mo. 1970); *Buchanan, supra, Schawartzburg, supra; Ganz* v. *Bensinger*, 480 F.2d 88 (7th Cir. 1973), right to counsel.

Prior disclosure to an inmate of information used by a parole board has also been held not to be required by the due process clause. *Menechino, supra; Barradale* v. *United States Board of Paroles and Pardons*, 362 F.Supp. 338 (M.D. Pa. 1973); *Ott, supra; Wiley, supra; Goble* v. *Bounds*, 281 N.C. 307, 188 S.E.2d 347 (1972).

The right to have witnesses present as well as the right to cross-examine "adverse" witnesses has also been rejected. *Barradale, supra; Tarlton* v. *Clark*, 441 F.2d 384 (5th Cir. 1971); *Menechino, supra; Wiley supra.*

It has also been held that there is no constitutional requirement that a parole board give reasons for denying parole. *Battle* v. *Norton*, 365 F.Supp. 925 (D. Conn. 1973); *Menechino, supra; Barradale, supra.*

It is submitted that any application of due process of law requirements similar to those required by this Court in *Morrissey, Gagnon,* or *Wolff* to parole procedures would have no other effect other than making those procedures adversary in nature. The nature of the parole system is such that a requirement that it be adversary would destroy its nature and goals.

Amicus Curiae has quoted extensively in this Brief language of this Court respecting the application of the due process clause to procedures other than parole procedures. The purpose is to demonstrate that this Court has taken into account, by necessity, the nature of those procedures as well as the effect of applying to these procedures due process requirements. It is submitted that this Court's careful and limited holdings that due process of law requirements are applicable to various procedures fortifies the contention of Amicus Curiae that such requirements are not applicable to parole procedures and that thus the due process clause itself is not applicable.

The District Court in the case at bar stated very well the difficulty in applying due process of law to parole hearings. It stated:

> ". . . The administrative burden of the parole system would be enormously increased if each inmate were given a plenary hearing on his suitability for parole.

> Further burdens would ensue with requirements of notice, procedures for the appointment of counsel and reporters, subpoenaing and cross-examination of witnesses, compensation of counsel and cost of transcripts, and the preparation of findings and conclusions by the Board. Such requirements would likely result in congested dockets before the Board of Paroles and result in undue delay in reviewing the individual cases of 10,000 prisoners in the system as each becomes eligible for parole consideration. The state is not constitutionally required to provide for the parole of prisoners, and if the Plaintiff's demands were enforced and the burden of the prison system became too great, the state might find it necessary or desirable to terminate the parole system."

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed copies of the foregoing Brief of the Commonwealth of Virginia as Amicus Curiae in Support of Petitioners to Howard Lesnick, Esquire, Counsel for Respondent, University of Pennsylvania School of Law, 3400 Chestnut Street, Philadelphia, Pennsylvania 19174, and to Jacob L. Safron, Assistant Attorney General, Counsel for Petitioners, Justice Building, Post Office Box 629, Raleigh, North Carolina, on July 16, 1975.

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